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REPORTS

OF

CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

VOLUME 213.

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN DECEMBER,
1904, AND FEBRUARY, 1905, AND CASES IN WHICH REHEAR-
INGS WERE DENIED AT THE FEBRUARY TERM, 1905.

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ISAAC NEWTON PHILLIPS,

REPORTER.

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JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

JAMES B. RICKS, CHIEF JUSTICE.

BENJAMIN D. MAGRUDER,	}	JUSTICES.
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JAMES H. CARTWRIGHT,		
CARROLL C. BOGGS,		
JOHN P. HAND,		
GUY C. SCOTT,		

ATTORNEY GENERAL,
H. J. HAMLIN,
WILLIAM H. STEAD.*

REPORTER,
ISAAC NEWTON PHILLIPS.

CLERK,
CHRISTOPHER MAMER.

*At the general election held November 8, 1904, William H. Stead was elected Attorney General to succeed H. J. Hamlin.

TABLE OF CASES

REPORTED IN THIS VOLUME.

A	PAGE.		PAGE.
Allison Ditch District No. 2 <i>ads. Pinkstaff</i>	186	Chicago, City of, <i>ads. Mc-</i> <i>Chesney</i>	592
Allison Ditch District No. 2 <i>ads. Wathen</i>	138	Chicago, City of, <i>v. Rich-</i> <i>ardson</i>	96
Anheuser-Busch Brewing Ass. <i>v. Rahlf</i>	549	Chicago, City of, <i>ads. Sher-</i> <i>iffs</i>	620
Ankiewicz <i>ads. Central Ry.</i> Co.	631	Chicago, City of, <i>ads. Win-</i> <i>kelman</i>	360
Austin State Bank <i>ads. Mor-</i> <i>rison</i>	472	Chicago, City of, <i>ads. Ziegler</i>	61
		Chicago City Ry. Co. <i>v.</i> <i>Saxby</i>	274
B		Chicago & Eastern Illinois R. R. Co. <i>v. People ex rel.</i>	497
Bahre <i>ads. Fairbank Co.</i> ...	636	Chicago & Joliet Electric Ry. Co. <i>v. Spence</i>	220
Barkley <i>v. Dale</i>	614	Chicago & Milwaukee Elec- tric R. R. Co. <i>v. Diver</i> ...	26
Beall <i>ads. Dingman</i>	238	Chicago & Milwaukee Elec- tric Ry. Co. <i>v. Ullrich</i> ...	170
Biggins <i>v. Lambert</i>	625	Chicago & Milwaukee Elec- tric Ry. Co. <i>v. Vollman</i> ..	609
Bonfield <i>ads. O'Brien</i>	428	Chicago North Shore Street Ry. Co. <i>v. Strathmann</i> ...	252
Brooks <i>ads. Hahl</i>	134	Chicago Terminal Transfer R. R. Co. <i>v. O'Donnell</i> ...	545
Butman <i>v. Butman</i>	104	Cincinnati, Ind. & Western Ry. Co. <i>v. People ex rel.</i>	558, 197
Buzis <i>ads. Spring Valley</i> Coal Co.	341	Cincinnati, Ind. & Western Ry. Co. <i>ads. People ex rel.</i>	503
C		Cleveland, Cin., Chicago & St. Louis Ry. Co. <i>v. Pole-</i> <i>cat Drainage District</i>	83
Central Ry. Co. <i>v. Ankie-</i> <i>wicz</i>	631		
Chicago, Burl. & Q. R. R. Co. <i>ads. People ex rel.</i> ...	225		
Chicago, Burl. & Q. R. R. Co. <i>v. People ex rel.</i>	458		
Chicago, City of, <i>ads. Fisher</i>	268		
Chicago, City of, <i>ads. Hul-</i> <i>bert</i>	452		
Chicago, City of, <i>ads. Jones</i>	92		

	PAGE.		PAGE.
Crawford <i>ads.</i> Luther.....	596	Grant Land Ass. <i>v.</i> People	
Crocker <i>v.</i> People.....	287	<i>ex rel.</i>	256
Cummings & Co. <i>v.</i> People		Griveau <i>v.</i> South Chicago	
<i>ex rel.</i>	443	City Ry. Co.....	633

D

Dale <i>ads.</i> Barkley.....	614
Davis <i>ads.</i> Day.....	53
Davis <i>v.</i> Pfeiffer.....	249
Day <i>v.</i> Davis.....	53
Dickerson <i>ads.</i> Strayer.....	414
Dickey & Baker <i>v.</i> People	
<i>ex rel.</i>	51
Dickinson <i>ads.</i> Torrey.....	36
Dingman <i>v.</i> Beall.....	238
Diver <i>ads.</i> Chicago & Mil-	
waukee Electric R. R. Co.	26
Durbin <i>ads.</i> Lohmeyer.....	498

E

EauClaire Canning Co. <i>v.</i>	
Western Brokerage Co..	561
Eustace <i>v.</i> People <i>ex rel.</i> ...	424
Evans <i>v.</i> Woodsworth.....	404

F

Fairbank Co. <i>v.</i> Bahre.....	636
First Nat. Bank of Belleville	
<i>ads.</i> Thomas.....	261
Fisher <i>v.</i> City of Chicago..	268
Floto <i>v.</i> Floto.....	438
Fossick <i>ads.</i> Wenom.....	70
Freitag <i>ads.</i> Gerbrich.....	552
Friesenecker <i>ads.</i> Lang....	598

G

Gabbert <i>ads.</i> Hall.....	208
Gage <i>v.</i> People <i>ex rel.</i>	
.....	468, 457, 410, 347
Gerbrich <i>v.</i> Freitag.....	552
Glos <i>v.</i> Miller.....	22
Glos <i>v.</i> Stern.....	325
Glos <i>v.</i> Talcott.....	81
Granat <i>v.</i> Kruse.....	328

H

Hahl <i>v.</i> Brooks.....	134
Hall <i>v.</i> Gabbert.....	208
Harris <i>v.</i> City of Macomb..	47
Hayner <i>v.</i> People.....	142
Healy <i>v.</i> Protection Mutual	
Fire Ins. Co.....	99
Hill <i>ads.</i> Rubens.....	523
Hulbert <i>v.</i> City of Chicago..	452

I

Illinois Central R. R. Co. <i>v.</i>	
People <i>ex rel.</i>	174
Illinois Central R. R. Co.	
<i>ads.</i> People <i>ex rel.</i>	367
Illinois Central R. R. Co. <i>v.</i>	
Swift.....	307
Illinois, Iowa & Minnesota	
Ry. Co. <i>v.</i> Powers.....	67
International Packing Co.	
<i>ads.</i> Wenham.....	397
Irwin <i>v.</i> Sample.....	160

J

Jespersen <i>v.</i> Mech.....	488
Johnston <i>ads.</i> Paltzer.....	338
Jones <i>v.</i> City of Chicago...	92
Jones <i>v.</i> Jones.....	228

K

Keach <i>ads.</i> Livingston Co.	
Building and Loan Ass..	59
Kinsloe <i>v.</i> Pogue.....	302
Knox <i>ads.</i> Slack.....	190
Kruse <i>ads.</i> Granat.....	328

L

Lambert <i>ads.</i> Biggins.....	625
Lang <i>v.</i> Friesenecker.....	598

	PAGE.		PAGE.
Livingston County Building and Loan Ass. <i>v.</i> Keach...	59	People <i>ads.</i> Crocker.....	287
Lobdell <i>ads.</i> Ray.....	389	People <i>ex rel. ads.</i> Cum- mings & Co.....	443
Lohmeyer <i>v.</i> Durbin.....	498	People <i>ex rel. ads.</i> Dickey & Baker.....	51
Luther <i>v.</i> Crawford.....	596	People <i>ex rel. ads.</i> Eustace..	424
M		People <i>ex rel. ads.</i> Gage....	
Macomb, City of, <i>ads.</i> Har- ris.....	47 468, 457, 410,	347
Magerstadt <i>v.</i> Schaefer....	351	People <i>ex rel. ads.</i> Grant Land Ass.....	256
Maplewood Coal Co. <i>In re.</i>	283	People <i>ads.</i> Hayner.....	142
McCaslin <i>ads.</i> Morgan & Wright.....	358	People <i>ex rel. ads.</i> Illinois Central R. R. Co.....	174
McChesney <i>v.</i> City of Chi- cago.....	592	People <i>ex rel. v.</i> Illinois Central R. R. Co.....	367
Mech <i>ads.</i> Jespersen.....	488	People <i>ads.</i> Murphy.....	154
Meier <i>ads.</i> Rickman.....	507	People <i>ex rel. v.</i> Stearns... 184	
Miller <i>ads.</i> Glos.....	22	People <i>ex rel. ads.</i> Wabash R. R. Co.....	522
Morgan & Wright <i>v.</i> Mc- Caslin.....	358	People <i>v.</i> Waite.....	421
Morrison <i>v.</i> Austin State Bank.....	472	People <i>ads.</i> Wistrand.....	72
Mortimer <i>v.</i> Potter.....	178	People <i>ads.</i> Zuckerman.... 114	
Murphy <i>v.</i> People.....	154	Pfeiffer <i>ads.</i> Davis.....	249
O		Pinkstaff <i>v.</i> Allison Ditch District No. 2.....	186
O'Brien <i>v.</i> Bonfield.....	428	Pogue <i>ads.</i> Kinsloe.....	302
O'Donnell <i>ads.</i> Chicago Ter- minal Transfer R. R. Co..	545	Polecat Drainage District <i>ads.</i> Cleveland, Cin., Chi- cago & St. Louis Ry. Co..	83
Olcott <i>v.</i> Tope.....	124	Policemen's Benevolent Ass. of Chicago <i>v.</i> Ryce.....	9
Onasch <i>v.</i> Zinkel.....	119	Potter <i>ads.</i> Mortimer.....	178
P		Powers <i>ads.</i> Illinois, Iowa & Minnesota Ry. Co.....	67
Paltzer <i>v.</i> Johnston.....	338	Powers <i>ads.</i> Weber.....	370
People <i>ex rel. v.</i> Chicago, Burl. & Quincy R. R. Co..	225	Protection Mutual Fire Ins. Co. <i>ads.</i> Healy.....	99
People <i>ex rel. ads.</i> Chicago, Burl. & Quincy R. R. Co..	458	R	
People <i>ex rel. ads.</i> Chicago & Eastern Ill. R. R. Co..	497	Rahlf <i>ads.</i> Anheuser-Busch Brewing Ass.....	549
People <i>ex rel. ads.</i> Cincin- nati, Ind. & Western Ry. Co.....	197	Ray <i>v.</i> Lobdell.....	389
People <i>ex rel. v.</i> Cincinnati, Ind. & Western Ry. Co..	503	Richardson <i>ads.</i> City of Chi- cago....	96
		Rickman <i>v.</i> Meier.....	507

	PAGE.		PAGE.
Rowe <i>v.</i> Taylorville Elec- tric Co.	318	Thomas <i>v.</i> Waters.	141
Rubens <i>v.</i> Hill.	523	Tope <i>ads.</i> Olcott.	124
Ryce <i>ads.</i> Policemen's Be- nevolent Ass. of Chicago.	9	Torrey <i>v.</i> Dickinson.	36
S		U	
Sample <i>ads.</i> Irwin.	160	Ullrich <i>ads.</i> Chicago & Mil- waukee Electric Ry. Co..	170
Saxby <i>ads.</i> Chicago City Ry. Co.	274	V	
Schaefer <i>ads.</i> Magerstadt..	351	Vollman <i>ads.</i> Chicago & Mil- waukee Electric Ry. Co..	609
Sharp <i>v.</i> Sharp.	332	W	
Sheriffs <i>v.</i> City of Chicago.	620	Wabash R. R. Co. <i>v.</i> Peo- ple <i>ex rel.</i>	522
Slack <i>v.</i> Knox.	190	Waite <i>ads.</i> People.	421
South Chicago City Ry. Co. <i>ads.</i> Griveau.	633	Waters <i>ads.</i> Thomas.	141
Spence <i>ads.</i> Chicago & Joliet Electric Ry. Co.	220	Wathen <i>v.</i> Allison Ditch District No. 2.	138
Spring Valley Coal Co. <i>v.</i> Buzis.	341	Weber <i>v.</i> Powers.	370
Stearns <i>ads.</i> People <i>ex rel.</i> ...	184	Wenham <i>v.</i> International Packing Co.	397
Stern <i>ads.</i> Glos.	325	Wenon <i>v.</i> Fossick.	70
Strathmann <i>ads.</i> Chicago North Shore St. Ry. Co..	252	Western Brokerage Co. <i>ads.</i> EauClaire Canning Co..	561
Strayer <i>v.</i> Dickerson.	414	Weston <i>v.</i> Teufel.	291
Swift <i>ads.</i> Illinois Central R. R. Co.	307	Winkelman <i>v.</i> City of Chi- cago.	360
T		Wistrand <i>v.</i> People.	72
Talcott <i>ads.</i> Glos.	81	Woodsworth <i>ads.</i> Evans... ..	404
Taylorville Electric Co. <i>ads.</i> Rowe.	318	Z	
Teufel <i>ads.</i> Weston.	291	Ziegler <i>v.</i> City of Chicago... ..	61
Thomas <i>v.</i> First Nat. Bank of Belleville.	261	Zinkel <i>ads.</i> Onasch.	119
		Zuckerman <i>v.</i> People.	114

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF ILLINOIS.

THE POLICEMEN'S BENEVOLENT ASSOCIATION OF CHICAGO

v.

MARY RYCE.

Opinion filed December 22, 1904.

1. PRESUMPTIONS—*death is presumed from seven years' continuous absence.* The unexplained absence of a person from his usual place of abode for seven continuous years, and from whom no intelligence has been received within that time, raises a presumption of death upon which the jury may act, where no sufficient facts or circumstances are proven to overcome the presumption.

2. INSTRUCTIONS—*when instruction is not misleading, as representing presumption to be conclusive.* An instruction which, after stating the facts necessary to raise a legal presumption of the death of a person from his seven years' unexplained absence, authorizes the jury, upon such proof, to presume that such person is dead, is not misleading, as representing the presumption to be conclusive, where other instructions direct the jury to consider all proved facts and circumstances attending his disappearance, and that if they believe, from the evidence, the person is not dead they shall so find.

3. SAME—*when omission of requirement respecting continuous search is harmless.* Omission from an instruction concerning the presumption of death from seven years' unexplained and continu-

ous absence, of the requirement that diligent search has been made, is harmless, where other instructions require proof of the case by a preponderance of evidence "as charged in the declaration," which alleges diligent and continuous search.

4. SAME—*when instruction is erroneous in singling out particular fact.* An instruction which singles out the fact of the expressed intention of a missing person to return to his home when he left for the last time as to be considered by the jury in determining whether he is dead, is properly refused, where other instructions already given require them to take into consideration upon that question all the facts and circumstances developed by the evidence.

5. SAME—*when instruction as to satisfactory evidence of death is misleading.* An instruction in an action on an insurance certificate, which tells the jury that before they could award a recovery they must believe, from the evidence, that defendant had received "satisfactory evidence of the death" of the insured, is misleading and uncertain in not defining what is meant by satisfactory evidence.

6. EVIDENCE—*when admission of improper evidence is harmless.* Admission in evidence of a police record book showing the disappearance of a person on a certain date, even if for any reason it is incompetent, is harmless, where the fact sought to be proved thereby is fully established by other competent evidence.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. FRANK BAKER, Judge, presiding.

The following is a statement of the facts in this case, as made by the Appellate Court in their opinion deciding it, with the exception of the parts omitted where stars occur, to-wit:

"James Ryce, on February 19, 1890, was a member of the police force of the city of Chicago in good standing, and on that day received a certificate of insurance from the appellant association, in which the appellee, Mary Ryce, then his wife, was named beneficiary, by which the association agreed to pay to her within thirty days after satisfactory evidence of the death of said James Ryce, two dollars for every member of the association, provided that amount should in no event exceed \$2000.00. On May 15, 1895, while still a member of said association, in good standing,

and having paid all his dues and assessments up to that time, said Ryce disappeared, and has never since May 16, 1895, been heard of, although diligent search for him had been made up to the time of the commencement of this suit, on August 8, 1902. Presuming that he was dead, appellee, having paid all her husband's dues and assessments, brought this suit, and recovered a verdict, and judgment thereon, of \$2000.00, from which the association has appealed. * * *

"The evidence * * * shows, in substance, that James Ryce was married to appellee in May, 1889, and was then aged about twenty-nine years. They lived happily together as husband and wife until May 15, 1895, and had one child born to them, which was nearly five years of age at that time. Mr. Ryce had been a member of the police force of Chicago prior to his marriage, and was thereafter from time to time until May 7, 1895, when, under a general order of the then mayor, he was, with five hundred other police officers, discharged. During his time of service he was discharged once or twice prior to May 7, 1895, as the evidence tends to show, because of changes in the city administration. * * * The evidence on behalf of the appellant is also to the effect that he was once discharged because of absence from duty without permission, intoxication and neglect of duty. There is also a conflict in the evidence as to Mr. Ryce's habits with regard to the use of intoxicating liquors, but * * * while it tends to show that he was in the habit of drinking occasionally * * * he was in no way seriously affected thereby. On May 15, 1895, he left his home at Cragin near the western limits of Chicago in the morning, after bidding good-by and kissing his wife and little girl, and stating to the former that he would return on the afternoon train. His wife says that she expected that he would return on the afternoon train, but he did not—that she waited until the twelve o'clock train was due, but he did not come, and she has never since heard anything from him. On the second day after his disappearance, appellee's

brother, and a police officer, named Lyons, inquired for Mr. Ryce at a saloon on West Madison street in Chicago, where it was suggested he might go, and were told by a bar-tender that Mr. Ryce had been in the saloon the previous day or evening. With this exception no information or intelligence as to his whereabouts has ever been received by his wife, relatives, friends, or any one else, so far as known, although a dispatch containing his description in detail, and that he had been missing since the previous Wednesday, which was May 15, was sent out on May 21, 1895, to each police station in the city of Chicago, and it was read to the police officers at roll-call in at least one station. It appears that it was the custom to read at roll-call such dispatches at every police station in the city. The record of the dispatch in question, kept by the police department in Chicago in the regular course of business, indicates that this dispatch was sent to all the stations in Chicago on said May 21. The evidence shows that appellee made numerous inquiries of her neighbors and friends and of numerous relatives of Mr. Ryce, and, as she says, of 'every one I came in contact with; all that I knew,' but was unable to get any information with regard to him. It appears that his disappearance was a matter of common talk among his acquaintances and neighbors, and that many of them had been inquiring after him to find out his whereabouts, but no information was ever received by the many, who were called to testify. Also, several of his relatives who were called to testify stated that they made like inquiries, but none of them could get any information of him. It is shown that one of his sisters, Mrs. Bridget Walsh, with whom he lived for about five years prior to his marriage, and whom he visited once or twice a week at her home after his marriage, notified certain of his relatives in Wisconsin and in Ireland of his disappearance, but received no communication from them. She says in this regard: 'I have kept up the correspondence among my relatives, and inquired for my brother and never heard from him in any way. * * *

I corresponded with my mother in Ireland, wrote that my brother had disappeared, and that I could not find him, and I believed him dead. I asked her if she had heard from him. She said no. I got a reply by letter about six weeks later. I have not that letter. I don't know where it is."

Upon appeal to the Appellate Court, the judgment of the circuit court in favor of appellee for \$2000.00 has been affirmed; and the present appeal is prosecuted by the appellant association from such judgment of affirmance.

CANNON & POAGE, for appellant.

JOHN C. KING, and WILLIAM J. KING, (ANDREW J. HIRSCHL, of counsel,) for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

By stipulation between the parties, substantially all the facts, necessary to establish a right of recovery in the appellee, are admitted, except the fact of the death of the insured. It was agreed between the parties that, at the time of the commencement of this suit, James Ryce, the insured, was a member of the appellant association in good standing; that all dues and assessments were paid up; and that the association on February 19, 1890, issued the certificate of insurance, as described in the statement preceding this opinion, to James Ryce. The undisputed evidence in the case is that James Ryce, the insured, was the husband of the appellee. The only question, therefore, to be determined by the jury, was the question whether or not the jury were authorized by the evidence to presume that the insured was dead at the time of the commencement of the present suit. This question is raised upon the record by the motion of the appellant at the close of the evidence of the plaintiff below, and again at the close of all the evidence, to instruct the jury to find a verdict in favor of the defendant below, the appellant here.

At the close of all the evidence the defendant submitted to the court a written instruction to the jury to find the issues for the defendant, and this instruction was refused, to which ruling exception was taken by the defendant. The facts are settled by the judgments of the lower courts, and the only matters to be decided by us are questions of law, arising out of the action of the trial court in giving and refusing instructions, and in ruling upon the evidence.

The court gave one instruction for the plaintiff below, and three instructions for the defendant below. The instruction, so given for the plaintiff below, appellee here, is as follows:

"The court instructs the jury, as a matter of law, that if you find from the preponderance of the evidence in this case that James Ryce, the insured, left his residence and home and has been continually absent therefrom for a period of over seven years without any intelligence being received of his whereabouts by the members of his family, relations, neighbors and acquaintances within said period or at any time thereafter, then such continuous absence, together with such lack of intelligence, raises the presumption of death of the said James Ryce, and the jury on such proof have a right to presume his death."

The three instructions so given on behalf of the defendant below, appellant here, are as follows:

1. "The jury are instructed that in determining whether the insured, James Ryce, was dead at the commencement of this suit, they must consider all the circumstances under which he left which are shown on this trial, together with the length of time he has been gone, if any, and from all these facts and circumstances, the jury must determine whether the said James Ryce was in fact dead at the time of the commencement of this suit.

2. "The court instructs the jury that in order to recover in this case the plaintiff must establish her case, as charged in her declaration, by the preponderance of the evidence.

3. "The jury are instructed that, if you believe from the evidence and all the facts and circumstances shown on this trial, that the insured, James Ryce, was not dead at the time of the commencement of this suit, then your verdict must be for the defendant."

First—It is said by counsel for appellant that the instruction, given for the appellee, is erroneous upon the alleged ground that it presents to the jury the presumption of death, arising from the absence of the insured for seven years without any intelligence as to his whereabouts, as a conclusive presumption; and that, in this respect, the instruction amounted to a direction to the jury to find for the appellee, if an absence of seven years without such intelligence was shown.

The language of the instruction is substantially the same as that which has been used by this court in a number of cases. In *Hitz v. Ahlgren*, 170 Ill. 60, we said (p. 63): "The rule in this State is, that the absence of a person for seven years from his usual place of abode or resort, and of whom no account can be given, and from whom no intelligence has been received within that time, raises the presumption that he is dead." To the same effect is *Reedy v. Millizen*, 155 Ill. 636; *Johnson v. Johnson*, 114 id. 611.

Counsel for appellant criticise the following words at the close of the instruction, to-wit, "and the jury on such proof have a right to presume his death," and say that those words amounted to a direction to the jury to find for the plaintiff. The language thus objected to, however, was used by this court in a discussion of this subject in the case of *Whiting v. Nicoll*, 46 Ill. 230, where it was said (p. 235): "So that it has become to be regarded as a settled principle, that the absence of a party for seven years without any intelligence being received of him in that time raises the presumption that he is dead, and the jury, on proof of such absence, have a right to presume his death."

The instruction, upon a careful consideration of its terms in connection with the instructions given for the appellant, is not justly subject to the criticism thus made upon it. The instructions, considered as one charge, authorized the jury to take into consideration the circumstances, attending the disappearance of the insured, and bearing upon the question whether he was dead or not. The presumption of death, arising from an unexplained absence of seven years, is not a conclusive presumption, but may be rebutted by proof of facts and circumstances inconsistent with and sufficient to overcome it. The presumption of death, under such circumstances, may be overcome by proof of facts and circumstances, raising a contradictory presumption. (*Johnson v. Johnson, supra*; *Reedy v. Millizen, supra*). The jury were told that they must consider all the circumstances, under which the insured left, which were shown on the trial, together with the length of time he had been gone, and from all such facts and circumstances they were to determine whether he was in fact dead at the time of the commencement of the suit; and they were also told that, if they believed from the evidence and from all the facts and circumstances shown on the trial, that the insured was not dead at the time of the commencement of the suit, their verdict should be for the defendant. Under the instructions, the jury were warranted in finding the fact of death after due consideration of all the other facts in evidence, but the fact of such death was not thereby presented to the jury as a conclusion, which they were obliged to draw in the face of proof furnishing ground for other inferences. There was some testimony, tending to show that the insured had been discharged from the police force, and that he was in the habit of using intoxicating liquors. It was for the jury to say, whether such facts were sufficient to justify them in believing that he remained away from home because of them, and not necessarily that he should be presumed to be dead. We are of the opinion that the instructions did not present the

presumption of death as a rule of law, which imposed upon the jury an imperative obligation to find the fact of such death in favor of the appellee.

The instruction is also complained of, as omitting any reference to the question whether or not inquiry or search was made for the insured. In *Hitz v. Ahlgren*, *supra*, we said (p. 63): "In order to enforce the presumption of death of a person after an absence of seven years, there must be evidence of diligent inquiry at the person's last place of residence, and among his relatives, and any others who probably would have heard from him, if living. * * * Long absence, alone, no matter how long continued, is not sufficient to raise the presumption of death. There must be shown an absence of seven years or more from the established residence of the party, before the presumption of death can be raised. * * * We hold, therefore, that mere absence of a person from a place where his relatives reside, but which is not his own residence, and mere failure on the part of his relatives to receive letters from him for a period of seven years, are not of themselves sufficient to raise a presumption of death. The absence must be from his usual place of abode or resort." The evidence is abundant in this case, that inquiries were made at the last place of residence of the missing James Ryce, and at his usual places of abode or resort. He had four or five sisters living in Chicago in different parts of the city. Inquiries were made of them. He had relatives living in Wisconsin. Inquiries were made there. He had relatives living in Ireland. Letters were written in reference to his absence to these relatives. The evidence tends to show that a policeman named Lyons, and a brother-in-law of James Ryce were told by a bar-tender in Chicago on May 17, the second day after James Ryce left his home, that Ryce was in his saloon on the evening of May 16. Complaint is made that the clue, alleged to have been thus furnished as to his whereabouts, was not followed up. The only ground for this complaint is the statement by the policeman,

Lyons, in his testimony that he did not see the bar-tender, who made this statement to him after May 17, and did not know where he could be found at the time his testimony was given. There is nothing in the evidence, so far as we have been able to discover, to show that this bar-tender knew anything about the whereabouts of James Ryce, except that he had been in his saloon on the evening of May 16. It cannot be said that, because of the information given by the bar-tender there was a failure to follow up a clue; but it was for the jury to say, as to this evidence and as to all the other facts and circumstances developed by the proof, whether or not those, whose business it was to inquire and search for the missing man, performed their duty in that respect. The objection, made by counsel for appellant to the instruction, is that it was silent upon this subject of inquiry or search.

The instruction, presented to the minds of the jury the question, whether or not James Ryce had been continually absent for a period of over seven years without any intelligence being received of his whereabouts; and such continuous absence, together with such lack of intelligence, was said by the instruction to raise the presumption of death. In view of the evidence, the language of the instruction involved a consideration of the evidence upon the question whether or not inquiries had been made as to the whereabouts of the insured. The jury were directed to consider whether or not there was a lack of intelligence as to his whereabouts, and this lack of intelligence, in view of the evidence, may have been the result of the inquiry and search shown by the proof to have been made. If there was no intelligence of the movements of the missing Ryce, the want of it was as much the result of inquiry and search, as of a failure to make such inquiry and search.

But whether the instruction is capable of this interpretation or not, the court instructed the jury at the request of the appellant, that the plaintiff in order to recover in this case "must establish her case as charged in her declaration by the

preponderance of the evidence." Upon referring to the declaration, we find the following allegation: "Said James Ryce suddenly and without explanation left and disappeared from his home 1039 North Fifty-first avenue, Chicago, has been unaccountably absent ever since, and has never returned or been heard of since said departure, although plaintiff has made diligent and continuous search for him and been wholly unable to find him or get any clue of him." When the jury were thus told that the plaintiff must establish her case as charged in the declaration, the jury, upon looking at the declaration, could not have concluded otherwise than that she must establish her case by showing that there had been diligent and continuous search for the missing Ryce. Certainly, the evidence tended to establish the fact of such diligent inquiry and search.

Second—Complaint is also made in behalf of the appellant, that the trial court erred in refusing three instructions asked by the appellant upon the trial below. Two of these instructions related to the subject of the intention of the insured when he left his home. These instructions told the jury that, in order to find that the insured James Ryce was dead at the commencement of this suit, they must believe from the evidence that, at the time he left his usual place of abode, he intended to return thereto, or at least to let his friends and relatives hear from him. The only positive evidence as to the intention of the insured upon this subject is the testimony of his wife, that, at the time of leaving, he told her he would return on the afternoon train. In view of this testimony, the refusal of the instruction could have done the appellant no harm, because the jury were bound to conclude that he did intend to return when he left, and, therefore, under the direction contained in the instruction, were bound to find that he was dead at the commencement of the suit, and not merely to entertain a presumption as to his death. The instruction singled out the fact of his expressed intent, and gives undue prominence to it as one of the circumstances

to be taken into consideration by the jury in coming to a conclusion upon the question whether or not he was dead. Instructions already given had required them to take into consideration all the facts and circumstances developed by the evidence, and it was wrong to single out and give prominence to one particular fact or circumstance.

As we understand the argument of counsel for appellant, it is that, if the circumstances were such as to indicate an intention on the part of the insured not to return, then his absence might be accounted for without assuming his death. That it to say, he may have intended to go elsewhere to engage in business, or may have had some other good reason for not wishing to return to his home. From such considerations it might be argued that his absence was not attributable to his death, but was due to other causes. On the contrary, the theory is that, if he intended to return when he left, and did not return, the presumption of his death would be stronger. The instruction in question eliminated from the consideration of the jury the question, whether any presumption would arise as to his death from the nature of his intention, but presented to them substantially the statement that such intent was conclusive evidence upon the subject. In this respect the instruction was erroneous, as it is well settled that it is a question for the jury to determine, from all the facts and circumstances, whether or not the fact of death at the time contended for exists.

It is also assigned as error that the court refused to give an instruction on behalf of the appellant, which told the jury that, before they could recover in this case, they must believe from the evidence adduced at the trial that the defendant had received satisfactory evidence of the death of James Ryce, the insured. By the terms of the certificate of insurance the appellant association agreed to pay the amount of the insurance money to Mrs. Ryce "within thirty days after satisfactory evidence of the death of said James Ryce." The evidence shows that on July 6, 1902, about two months

after the expiration of the seven years from the disappearance of the insured, Mrs. Ryce, or her attorney and agent, presented to the association affidavits, setting up all the facts in regard to the disappearance of Ryce, and the length of the time of his absence, and the efforts made to discover his whereabouts. It is not denied that the association refused to pay the \$2000.00 to the beneficiary in the certificate, and this suit is the result of such refusal. The question whether or not there was satisfactory evidence of the death of the assured was a question to be determined by the jury in this suit, and not by the association. The question in the case upon the trial below was, not whether the association received satisfactory evidence of death, but whether the jury trying this case believed from the evidence that such death had occurred. The instruction is misleading and uncertain in not defining what is meant by satisfactory evidence of death. While the questions of fact, whether proofs of loss or of death have been furnished, or whether the insured rendered as full proofs of loss or death, as the circumstances would permit, are for the jury, yet the legal effect of such proofs is a question of law for the court. (11 Ency. of Pl. & Pr. pp. 429, 431; *Thomas v. Burlington Ins. Co.* 47 Mo. App. 172.) In *Thomas v. Burlington Ins. Co. supra*, the court say: "Defendant's counsel, however, seems to have gone on the theory that the sufficiency of this paper as a proof of loss, whether or not it filled the requirements of the policy and the law, was a question for the jury, and an instruction was asked wherein this question of law was submitted to the jury. The court refused the instruction, and correctly, of course. It is the province of the court, and not the jury, to declare the legal effect to be given a written instrument." In addition to this, the declaration alleges that the plaintiff submitted satisfactory evidence of the death of the insured to the appellant association, and, as the jury were told by the instructions that the plaintiff must establish her case as charged in her declaration, they were required to find, if

such finding was important, that the association had received satisfactory evidence of the death.

Third—It is said that the court erred in admitting in evidence a record found in the office of the police department of the city of Chicago, kept by the desk sergeant in the ordinary course of his duty, for the reason that such duty was not imposed by law. It is not necessary to discuss the question whether the court erred or not in the admission of this police record. If it be admitted that there was error in its admission, it could not have done the appellant any harm. The only fact, sought to be established by it, was the fact that James Ryce had been missing since May 15, or 16, 1895. The fact that he had been missing since that date was so overwhelmingly established by other evidence that the additional confirmation thereof by the recital in the police record was of no importance, and added no particular weight to the testimony already given by the witnesses upon that subject.

We see no good reason for interfering with the judgments of the courts below. Accordingly, the judgment of the Appellate Court, affirming the judgment of the circuit court, is affirmed.

Judgment affirmed.

JACOB GLOS *et al.*

v.

JAMES A. MILLER.

Opinion filed December 22, 1904.

1. CLOUD ON TITLE—*what is not sufficient proof of title in complainant.* A warranty deed to complainant is not sufficient proof of title in a bill to remove a cloud, there being no proof of possession either of the grantor or grantee.

2. SAME—*proof must show possession or vacancy of property when bill was filed.* Proof that premises were vacant some years prior to the filing of a bill to remove a cloud is not sufficient proof that they were vacant at the time the bill was filed.

APPEAL from the Superior Court of Cook county; the Hon. M. KAVANAGH, Judge, presiding.

JACOB GLOS, *pro se*, (JOHN R. O'CONNOR, of counsel.)

H. M. MATTHEWS, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

This is a bill, filed on January 9, 1904, in the Superior Court of Cook county by the appellee against the appellants to remove a tax deed as a cloud upon certain lots in Cook county, alleged to be owned by the appellee. Answers were filed by the appellants, to which replications were filed. Upon a hearing of the cause, the court below entered a decree, declaring the tax deed void, and setting it aside upon certain conditions, and also setting aside a conveyance from Jacob Glos, holder of the tax title, to Emma J. Glos, his wife. The present appeal is prosecuted from the decree, so entered.

The bill in this case avers that appellee, the complainant therein, is the owner of the property, charged to be clouded by the tax deed sought to be removed. The record shows that the allegation of ownership, as made in the bill, was denied by both of the appellants, defendants below, in their answers. Counsel for appellee seeks to distinguish this case from the case of *Herve's v. Glos*, 170 Ill. 436, by stating, that, there, the ownership of the complainant was denied by the defendant, but that, in the case at bar, the ownership of the complainant is not denied by either defendant. Counsel, however, is mistaken in this statement. In the record the answer of Emma J. Glos contains the following: "She denies that said complainant is the owner of or in possession of the premises in said bill described." The record also shows the following statement in the answer of Jacob Glos, the other appellant and the other defendant below, to-wit: "He denies that said complainant is the owner of or in possession of the premises in said bill described."

Inasmuch as ownership is alleged in the bill, and denied in the answers, it was necessary for appellee to prove such ownership, and it would have been necessary to prove it, if it had been neither admitted nor denied. The only proof of ownership introduced is a warranty deed, dated November 5, 1889, executed by William H. Jacobs and his wife, and conveying the premises in question to appellee. There is no proof that appellee was ever in possession of the premises in question. A deed from a third person to the complainant in a bill to remove a cloud from the title, without further proof as to possession or title, does not establish title. Proof of possession under claim of ownership is *prima facie* evidence of such ownership in the claimant so in possession, and a deed from a grantor in possession may be sufficient *prima facie* evidence of ownership; but it is held by this court that a deed alone without such possession is not sufficient to establish title. (*Hewes v. Glos*, 170 Ill. 436; *Glos v. Huey*, 181 id. 149; *Harland v. Eastman*, 119 id. 22; *Glos v. Perkins*, 188 id. 467).

In a bill to remove a cloud from title, it must not only be alleged that the complainant is the owner of the premises, but also, either that the complainant is in the possession of the premises at the time of filing the bill, or that the premises are vacant and unoccupied when the bill is filed. (*Glos v. Randolph*, 133 Ill. 197; *Glos v. Perkins*, *supra*; *Glos v. Kemp*, 192 id. 72). The bill in the present case alleges that the premises were vacant and unoccupied at the time it was filed, and it was necessary for the appellee to prove that the premises were so vacant and unoccupied at the time the bill was filed. The evidence shows that the lots in question were vacant and unoccupied at a period several years anterior to the filing of the bill, but there is no testimony to show that they were so vacant and unoccupied at any time less than two years prior to the filing of the bill. It was not sufficient to show that the premises were vacant two years before the bill was filed. In *Glos v. Perkins*, *supra*, it was held that

evidence, that property was vacant and unoccupied some years before the filing of a bill to cancel tax deeds as clouds upon complainant's title, does not support an allegation, that the property was vacant and unoccupied, since it cannot be presumed from such proof that the property remained unoccupied up to the time the bill was filed, it being said in that case: "There is no fixed or continuing condition of property as to being vacant or unoccupied."

It thus appears that appellee failed to prove by satisfactory evidence, not only the allegation in his bill that he was the owner of the property, but also the allegation therein contained, that the property was vacant and unoccupied at the time of the filing of the bill.

This case is distinguishable from the case of *Glos v. Randolph*, 138 Ill. 268, upon which counsel for the appellant relies. In the case of *Glos v. Randolph*, *supra*, testimony was introduced orally upon the hearing, that the complainant in the bill was the owner of the land, but such testimony, though incompetent, was introduced without objection. Here, however, the record shows that, when appellee, Miller, testified upon the hearing below that he was the owner of the lots in question, counsel for appellant objected to that testimony, and upon his motion the testimony was stricken out.

There is testimony to the effect that appellee paid taxes upon the premises for some seven years, but it is not shown that they were vacant and unoccupied during all of the seven years, nor that possession was taken thereafter; hence, no title was acquired by that means.

For the reasons above stated, we are of the opinion that the decree of the court below is erroneous.

Accordingly, the decree of the superior court of Cook county is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

THE CHICAGO AND MILWAUKEE ELECTRIC RAILROAD CO.

v.

HELEN E. DIVER *et al.**Opinion filed December 22, 1904.*

1. EMINENT DOMAIN—*defendant not required to prove ownership.* Petitioner in condemnation is required, at its peril, to ascertain and name in the petition the true owner of the land sought to be condemned, and the person named is not required to prove title.

2. SAME—*petitioner desiring to question cross-petitioner's allegation of title must take issue.* A cross-petitioner asking an award of damages to land not taken must allege ownership of the land, but if petitioner desires to question such allegation it must raise the issue by appropriate pleadings.

3. SAME—*question of ownership must be decided before jury is empaneled.* The issue of the ownership of land, in a condemnation proceeding, is a preliminary one, which must be litigated and determined before the jury is empaneled to assess damages.

4. SAME—*damages attending failure to fence right of way for six months may be considered.* In the absence of a stipulation that petitioner, a railroad company, will fence its right of way as the road is constructed, it is proper to instruct the jury that under the statute the petitioner has six months to fence its road after completion, and that the damages, if any, attendant upon the keeping of the right of way open during that time are proper for the consideration of the jury.

5. SAME—*when damages may be estimated with reference to any motive power.* If the petitioner in a proceeding to condemn a railroad right of way is not willing to stipulate what motive power it will use, the defendants have the right to have their damages estimated with reference to any motive power which petitioner, under its charter, might elect to use.

6. INSTRUCTIONS—*when instruction as to danger from fire as an element of damage is not prejudicial.* An instruction as to the danger from fire as an element of damage in a proceeding to condemn a railroad right of way, which is proper and applicable to the proof as to the other defendants, is not improper as to one of the defendants who had no buildings on her land, where the evidence showed that fact and the jury viewed the premises.

7. SAME—*when parties are estopped to complain of instructions.* If the instructions of both parties to a condemnation proceeding assume that damages are to be assessed to lands not taken, neither can complain of such assumption in the other's instructions.

8. JUDICIAL NOTICE—*courts will not take judicial notice that a railroad is fenced as it is built.* Courts will not take judicial notice, as being a matter of common knowledge, that the right of way of railroad companies is fenced as the track is constructed.

APPEAL from the County Court of Lake county; the Hon. D. L. JONES, Judge, presiding.

F. S. MUNRO, and CHARLES WHITNEY, for appellant.

HANNA & MILLER, for appellees.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This was a petition filed by the appellant company for the condemnation of a right of way for the line of its road on and over certain tracts of lands and town lots belonging to the appellees, respectively.

The jury awarded the appellee Helen E. Diver \$2000 for land taken for the right of way and \$2600 for damages occasioned to land not taken, and the verdict was approved by the court. Counsel for the appellant concede that the amount awarded her for the land taken for the right of way is fair and reasonable, but insist that the damages awarded for lands not taken is excessive and not supported by the proofs.

Mrs. Diver owned a tract of land containing approximately 28 acres, situated between State street on its west, in North Chicago, and the Chicago and Northwestern Railway Company's tracks on the east. A narrow strip of land belonging to one A. C. Frost was situate between State street and a portion of Mrs. Diver's tract. The shape of Mrs. Diver's tract of land is substantially that of a square. The right of way of the appellant company, of the width of 70 feet, enters the tract near the north-west corner thereof and passes in a southerly direction through the tract, passing out near the south-west corner, leaving a strip west of the right of way 16.30 feet wide at the northernmost end and of the width of 128.54 feet at the south end. The length of the strip

is 1160 feet or thereabout, and it contains 2.14 acres. The right of way contains 1.815 acres, leaving 24 acres east of the right of way. The company stipulated it would construct two crossings across its right of way, each 32 feet in width, at points designated on a plat that was produced before the jury. The crossings were for the purpose of providing access from the lands on the west side of the right of way to the larger tract on the east thereof, and by means of which crossing the 24-acre tract would, in a degree, be made accessible from State street. The strip west of the right of way was well shown to be of the value of \$1000 per acre. That was the value per acre placed upon the land taken, and the appellant company concedes that such valuation was reasonable and fair. The strip was clearly worth that much, or more, per acre before the location of appellant's railroad. The lowest estimate of the damage to this tract was fifty per cent of its value. Seventy-five per cent of its value was the estimate of some of the witnesses. If computed at fifty per cent, the damages to that tract would be practically \$1100. Deducting this sum from \$2600, the total amount allowed for damages to lands not taken, would leave \$1500 as damages to the 24-acre tract east of the right of way. The testimony of the witnesses produced on behalf of Mrs. Diver was, in substance, that the 24-acre tract was best adapted to and most valuable for subdivision into lots and blocks for residence purposes, and that for such purposes it would be depreciated in value from ten to fifteen per cent. All of the witnesses, as counsel for the appellant in their brief concede, practically agreed that the land was worth \$1000 per acre for subdivision purposes. Estimating the depreciation at ten per cent, the lowest estimate of the percentage of depreciation for such purpose, the damages to this tract would be \$2400, which, added to the damages of \$1100 clearly shown to be occasioned to the strip west of the right of way, would make the total of the damages to the land of Mrs. Diver not taken \$3500,—\$900 greater than the judg-

ment sought to be reversed. Witnesses for the appellant company were of the opinion, and so testified, that the value of the 24-acre tract would be enhanced for manufacturing purposes by the construction of the railroad contemplated by the appellant company, and that its value for such purposes would be as great as it would have been for subdivision purposes before the construction of the railroad. There was a conflict in the testimony as to the purpose for which the land was best adapted and for which it was most valuable, and we are unable to say there was a decided weight of testimony supporting the view of the appellant company. The jury visited and inspected the premises and the surroundings, and had superior facilities and opportunity thereby for applying the testimony relative to this conflict and for determining whether the location of appellant's railroad would so affect the property as to render it as valuable for manufacturing purposes after the construction of the road as it was for subdivision purposes prior thereto. The amount allowed for damages to land not taken was clearly within the range of the testimony, and there is no reason we should disturb the verdict on the ground it is not supported by the proof.

The appellee Peter Fortune owned lots Nos. 8 and 9 in Lenox's subdivision of the south half of section 33, etc. He was allowed \$240 for the portions of his lots which were taken and was awarded damages in the sum of \$300 to the portions not taken. It is urged the amounts so allowed are unreasonable and against the weight of the evidence. Lot 8 lies adjoining to and immediately north of lot 9. The lots have a frontage of 25 feet, each, on State street and extend 125 feet eastward to an alley 16 feet in width. The right of way of appellant's road occupied the alley and extended over the easterly part of both of appellee's lots, taking therefrom a strip of the width of 24.6 feet at the north line of lot 8 and 35.14 feet at the south line of lot 9. The evidence of the greater number of witnesses estimated the value of the parts of the lots which were taken at a somewhat lesser amount

than was allowed. One witness, however, estimated the value of the portions of the lots taken at a greater sum than was awarded. The jury saw the premises and seem to have reached the conclusion that the evidence of this latter witness was entitled to the greater weight. We incline to the same conclusion. The two lots, as appeared from the testimony of all of the witnesses, were worth at least \$1000 exclusive of the buildings that stood thereon. One-fifth of lot 8 and one-fourth of lot 9 were actually taken, and it is clear that we cannot say that \$240 was palpably an excessive allowance for the parts of the lots that were taken. The allowance of \$300 as damages to the parts of the lots not taken was much less than the greater weight of the evidence would have warranted. The lots were materially shortened and were deprived of the benefit of an alley or any means of access to the rear as shortened, except by appropriating a portion of their frontage to that purpose.

Appellee Gibbons owned lot No. 10 in the same subdivision as the Fortune lots. His lot has a frontage of 25 feet on State street and extends eastward 125 feet to an alley 16 feet in width. The right of way of appellant's road covered the alley and extended over the easterly portion of the lot a distance of 35.14 feet at the north line of the lot and 41.18 feet at the south line thereof. The strip taken was valued at \$400 by the jury and \$300 was awarded as damages to the remainder of the lot. On the property taken there were a frame stable 16 by 22 or 24 feet and a frame water closet. The witnesses who testified as to this property variously estimated the value of the part of the lot that was taken and the damage to the remainder. The witnesses, except two of them, estimated the value of the land taken and the damage to that not taken at greater amounts than were fixed by the award of the jury. One of these two excepted witnesses, James G. Smith, valued the land taken at \$100 less than the jury allowed, but he estimated the damage to the land not taken at \$100 more than the award. The total of his esti-

mate is the same as the total award made by the jury. The other of the excepted witnesses, one Fred W. Cornish, differed so widely from all others who testified in this case that it is not strange his testimony did not control.

The only complaint as to the verdict and judgment as to the property of appellee Mary E. Thomas is, that the verdict is erroneous because it allowed to her damages to lot No. 2 without any proof that she was the owner of the lot. The petitioner in a condemnation proceeding is required, at its peril, to ascertain and name in the petition the true owner of the land sought to be condemned and taken, and the person so named as owner in the petition is not required to prove title. (*Peoria, Pekin and Jacksonville Railroad Co. v. Laurie*, 63 Ill. 264; *St. Louis and Southeastern Railway Co. v. Teters*, 68 id. 144.) The petitioner in a cross-petition who prays for an award for damages accruing to land which is not taken must allege in the petition that he or she is the owner of the property alleged to be damaged. If the original petitioner desires to contest the allegation of ownership by the cross-petitioner, he or it must, by appropriate pleadings, raise that issue. It is not contended that any such issue was raised in the case at bar. Had such issue been raised it would not have been submitted to the jury empaneled to assess the damages to be paid the land owner. The jury empaneled in this proceeding had no other duty to perform than to assess the value of land taken and the damages occasioned to land not taken. (*Lieberman v. Chicago and South Side Rapid Transit Railroad Co.* 141 Ill. 140.) In a condemnation proceeding, the issue of ownership, if any, is preliminary to the submission of the question of damages to the jury, and is to be litigated and determined before the jury is empaneled to assess the amount to be paid the owner. No question of title or ownership should be presented to the jury empaneled in such a proceeding.

It is urged that the court erred in giving instructions Nos. 1 and 2, and that for such alleged error the judgments

should be reversed. The complaint as to these instructions is, that they are so drawn as to imply that the lands not taken were damaged. These instructions were so carelessly drawn that the criticism is not wholly unfounded. But the implication, if any, was one which the appellant also proceeded upon in the instructions to the jury asked in its behalf. Instructions Nos. 5, 10 and 11 asked and given on behalf of appellant assumed that damages were to be assessed to lands not taken, and the implication in each of these instructions is more definite and direct than in instructions 2 and 3 given at the request of the appellees. Both litigants having proceeded in charging the jury on the theory damages to the lands not taken were established by the proofs, neither can be allowed to urge the action of the other as error. Moreover, there was no substantial ground on which to insist that damages for land not taken should be wholly denied to any of the cross-petitioners.

The complaint that said instruction No. 2 erroneously defined the "character of benefits" to lands not taken which may be deducted from the damages sustained by such property may also be disposed of by saying that instruction No. 19 asked and given at the request of appellant declared the same rule as did instruction No. 2.

Instruction No. 3 for appellees advised the jury that under the statute the appellant company was not required to fence its road until six months after it had completed the same, and that the damages, if any, attending the keeping open of the right of way during that time were proper for the consideration of the jury as an element of damage. This instruction was approved by this court in *St. Louis, Jerseyville and Springfield Railroad Co. v. Kirby*, 104 Ill. 345, *Centralia and Chester Railroad Co. v. Rixman*, 121 id. 214, and *Centralia and Chester Railroad Co. v. Brake*, 125 id. 393. The instruction here given did not, as did the instruction in the case last cited, assume that damages would necessarily attend the keeping open of the farm by the fail-

ure to fence, and the instruction given in that case was for that reason, and none other, condemned. The court cannot, as counsel for appellant urge, take judicial notice, as being a matter of common knowledge, that the rights of way of railroad companies are fenced as the track is constructed. The appellant company could have lawfully stipulated that it would fence its track and right of way at once on taking possession thereof, and thus have removed this element of damage from the consideration of the jury, but it declined to do so, and expressly so framed the stipulation it did submit as to stipulate only that it would construct and maintain fences along its right of way within six months after its line was open for use.

Instruction No. 4 given in behalf of the appellees charged the jury that in assessing damages "their inquiries must be confined to the market value of the land," etc. It is urged that the judgments should be reversed because the instruction did not expressly confine the inquiry of the jury to the "fair cash market value of the land." The jury were expressly informed that the only measure of damages was the "fair cash market value" thereof, by instructions Nos. 1, 13 and 14 given on behalf of the appellees, and also with equal explicitness and directness in instructions Nos. 1, 7, 10 and 20 given in behalf of the appellant. Moreover, the court, in the examination of witnesses, restricted the proof to the fair cash market value of the land, and the jury had no other testimony on which to act. When the instructions are considered as a series there is no room for the contention that the jury were misled to understand that some other standard of value than the "fair cash market price" could be considered by them.

Instruction No. 5 informed the jury that the element of danger by fire, if the jury believed there would necessarily be any increased danger from fire arising from the lawful operation of the contemplated road, or that the cost of insuring the buildings thereon would necessarily be increased

by the building and operation of the road and that the value of the premises would thereby be decreased, if proven, were proper for the consideration of the jury in arriving at a conclusion on the question of damages. It is urged the judgment in favor of Mrs. Diver should be reversed because of the giving of this instruction, as there was no building on her premises and no proof in her case relating to her premises upon which to base the instruction. The instruction was applicable to the proof of damages to be allowed other property owners defendant to the condemnation proceeding near whose buildings the road would run, and was proper as applied to those cases. The evidence showed that there was no building on Mrs. Diver's land, and the jury visited and viewed her premises, and we cannot conceive that it can be seriously contended that any injury could have resulted to the appellant from the giving of this instruction.

Instruction No. 6 cannot be construed as likely to mislead the jury to believe that the possibilities of injuries to persons or property from the negligent operation of the road was proper for their consideration. The instruction clearly refers only to actual and appreciable injuries resulting from the construction and operation of the railroad in a lawful manner and without negligence.

Instruction No. 7 was intended to advise the jury, and did no more than to advise them, that in estimating the compensation for land actually taken, no deductions could be made because of any benefits which would accrue to other portions of the lands not proposed to be taken. The criticism of this instruction is, that it should have gone further, and informed the jury that benefits to land not taken were proper to be considered in estimating the damages to land not taken. That benefits to land not taken were proper to be considered when arriving at a conclusion as to damages accruing to land not taken was repeatedly made known to the jury in a number of other instructions given at the request of the litigants, and the complaint that it was not again re-

peated in instruction No. 7, which had no relation to the question of damages to lands not taken, is so trivial that it, perhaps, might better have been passed without notice.

The charter of the appellant company authorized it to use steam or any other motive power in propelling its trains. The appellant company was not willing to stipulate that it would not use steam as a motive power, and has no right to complain that the court instructed the jury, as it did in instruction No. 8, that the property owners had the right to have their damages estimated with reference to any motive power the appellant, under its charter, might elect to use. *Lieberman v. Chicago and South Side Rapid Transit Railroad Co. supra*, is authority for the principle announced in this instruction.

The only objection to instruction No. 9 not disposed of by what has been hereinbefore said is, that the instruction declares that in arriving at the value of the land the jury may consider its value for the purpose for which it is shown by the evidence to be most available. Counsel for appellant declare that the true rule is, "that the value of the property shall be arrived at upon the basis of the uses and purposes for which it is best adapted." We content ourselves with the observation that we are unable to agree that the judgments should be reversed and new trials awarded because of the giving of this instruction.

The remarks made in disposing of other alleged errors fully answer the criticisms advanced against instructions Nos. 10 and 11 given in behalf of appellees.

The record is free from error reversible in character, and the judgments are affirmed.

Judgment affirmed.

WILLARD C. TORREY

v.

THEODORE G. DICKINSON *et al.**Opinion filed December 22, 1904.*

1. CREDITORS' BILLS—*clear proof is required to sustain conveyance from husband to wife.* Clear and satisfactory proof is required that a conveyance from husband to wife was made to place in her the legal title to the property of which she was the equitable owner, where the conveyance is without consideration and made just before the entry of a decree against the husband, for the acknowledged purpose of preventing the lien thereof from attaching to the property, which had stood in the husband's name for many years.

2. SAME—*when wife cannot claim property to the exclusion of husband's creditors.* A wife cannot, under the claim that her husband was acting as her agent, appropriate to herself, to the exclusion of the husband's creditors, the results of his time, labor and skill in manipulating real estate the legal title to which he has held for many years and of which he is the ostensible owner.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on writ of error to the Superior Court of Cook county; the Hon. AXEL CHYTRAUS, Judge, presiding.

PLINY B. SMITH, for plaintiff in error.

WILLIAM BENNETT MOORE, for defendants in error.

Mr. CHIEF JUSTICE RICKS delivered the opinion of the court:

On June 14, 1899, Willard C. Torrey, the plaintiff in error, obtained a decree in the superior court of Cook county against Theodore G. Dickinson, Edgar M. Snow and Henry H. Fuller, three of the defendants in error, for \$9025 and costs of suit. The objections of Dickinson to an adverse report of the master in chancery in that case were overruled on May 20, 1899. On June 7, 1899, two quit-claim deeds

were filed for record, dated May 25, 1899, and acknowledged the same day, executed by said Dickinson to his wife, Mary B. Dickinson, one of the defendants in error, each conveying, for an expressed consideration of one dollar, several lots in the city of Chicago. The master's report was confirmed on June 14, 1899, and the decree was entered as above stated. Executions were issued to the sheriffs of Cook and LaSalle counties, which were returned, after demand made upon the defendants, wholly unsatisfied, no property being found. On February 10, 1900, plaintiff in error filed in said superior court his creditor's bill against the defendants in error, alleging that said Theodore G. Dickinson, on and prior to the date of said quit-claim deeds, was the owner in fee simple of the several lots described therein; that said deeds were made upon no consideration, for the purpose of placing said lots beyond the reach of an execution, and that they were fraudulent as to complainant. The bill also alleged that on December 19, 1893, the said Theodore G. Dickinson was the owner and held title of record to certain other lots in Chicago described in the bill, and on that day, by quit-claim deed, conveyed the same to David Campbell, who by quit-claim deed of the same date conveyed the premises to said defendant Mary B. Dickinson for the expressed consideration of \$20,000; that said conveyances were without actual consideration and made to hinder and delay complainant in the collection of the indebtedness to him, and that said Theodore G. Dickinson remained the beneficial owner of said lots. The bill further alleged that on October 26, 1895, said Theodore G. Dickinson was the owner of another lot in Chicago therein described, and on that day conveyed the same by warranty deed, for an expressed consideration of \$5000, to Chester C. Barton; that on April 14, 1899, the said Chester C. Barton and wife conveyed the said lot to Mary B. Dickinson; that said two conveyances were merely colorable and without consideration and made to hinder and delay the complainant, and that Dickinson was still the beneficial owner of said lot.

The defendants Theodore G. Dickinson and Mary B. Dickinson, his wife, by their answers denied that any of said transfers were colorable or made with a fraudulent purpose, and alleged that all of said pieces of property were purchased with the money of the defendant Mary B. Dickinson; that the titles to the same were taken in the name of her husband, Theodore G. Dickinson, in trust for her, and that the subsequent conveyances to her were made for the purpose of placing in her the legal title to property of which she was already the equitable owner. The issues were referred to a master in chancery, who took the testimony and filed his report of the same, with his conclusions that no part of the funds of Theodore G. Dickinson was used in the purchase of said property; that all of it was purchased with the funds of the defendant Mary B. Dickinson, and that although the legal title was in him, she was all the time the equitable owner. He recommended a decree dismissing the bill for want of equity. Exceptions of the complainant to the report were overruled and a decree was entered dismissing the bill. On writ of error from the Appellate Court for the First District the decree was affirmed. The writ of error in this case was sued out by the plaintiff in error to review the judgment of the Appellate Court.

The material facts are as follows: The defendants Theodore G. Dickinson and Mary B. Dickinson were married in June, 1880. At different times after the marriage Mary B. Dickinson received from the estates of her father and brother sums of money aggregating \$8000. She paid \$1500 so received for a lot on Division street and in a couple of years sold the lot at an advance of \$2500. With the proceeds of that sale and money so received from said estates she bought other property on Division street, and by encumbering it erected a row of apartment buildings, known as the Belleville flats. She rented the Belleville flats and held title thereto until November, 1899, when she exchanged that property for lots described in the bill of complaint, known as the North

Clark street property, which was encumbered for \$12,000. The exchange was an even one, subject to the encumbrances on the respective properties, and the title to the North Clark street property was taken in the name of the husband, Theodore G. Dickinson. Both Mr. and Mrs. Dickinson testified that the title was taken in his name for the purpose of getting a larger mortgage on the property and because it was easier for a man to obtain a large loan than a woman. There were stores upon the front of the property, which were leased for \$3600 per annum, and it was contended by the defendants, and Mr. and Mrs. Dickinson both testified, that this property, which was paid for with property of Mrs. Dickinson, was the beginning and source from which all the rest of the property involved in the litigation afterward grew. Mr. Dickinson was engaged in the real estate business from 1885 or 1886 to 1892, during all the time that the various pieces of property were acquired, first with Edgar M. Snow, and afterward with Snow and Henry H. Fuller. From the time that said deed was made to Mr. Dickinson he assumed the entire control and management of the property thereby conveyed and of all the property subsequently acquired. He managed the property in every respect as his own, except that he and his wife both testified that he advised with her as to what was best to be done. The firm in which Mr. Dickinson was a partner secured options on various pieces of property under agreements by which such property was subdivided and the title conveyed to Fuller, one of the partners, who executed separate notes and mortgages on each lot and conveyed the lots to purchasers subject to the mortgages. If they were able to dispose of the lots in that way they availed themselves of the option and received the difference between the sales and the option price as their profit. All the other property involved in the suit was obtained in carrying out these option deals. The first of these transactions was in September, 1890, when the title to a lot numbered 14 was conveyed to Mr. Dickinson and it was subsequently divided

into a number of lots. He testified that the lot was purchased by him for his wife, subject to a mortgage of \$6000; that he paid \$2300 in cash of her money for the lot; that she had had the income from the North Clark street property at the rate of \$3600 per annum for ten months and had collected rents previously for the Belleville flats. This property was on Prairie avenue and it stood vacant for a number of years, when money was borrowed with which the previous encumbrance was paid and eight small houses were erected. Mr. Dickinson signed the papers, had charge of the erection of the buildings and the contracts were made by him. For several years Mr. and Mrs. Dickinson lived in one of these houses and she collected rents for a time, but afterwards that business was placed in the hands of a real estate firm. There are separate mortgages on these lots. One of them was sold by Dickinson to Chester C. Barton in 1895 and was conveyed to him. He held the title until April, 1899, when, being unable to meet the payments, he conveyed the lot to Mrs. Dickinson.

The next transaction related to the State street and Cloud court property, which property was acquired in June or July, 1891, from one of the options, by which the firm could take property at an advanced price and upon finding purchasers had the excess above the option price for their own profit. This property was on State street and Cloud court and included with other property in the option, and the title was taken by Mr. Dickinson. It was vacant property and was all subject to a mortgage of \$26,000, and \$3900 cash was paid for the equity. Mr. and Mrs. Dickinson both testified that this property was bought exclusively with the money of Mrs. Dickinson and the title taken in the name of Dickinson in trust for Mrs. Dickinson. Not long after the purchase Mr. Dickinson made a lease to the property for ninety-nine years, with a condition that the lessee should construct a building upon it of the value of \$40,000 and that the lessor would advance \$18,000 for use in the building, the money thus

advanced to be returned by an increase in the scale of rents. The building was constructed and after two or three years the lease was forfeited. During the time it was held under that lease the evidence discloses that the rents were collected by Mrs. Dickinson. In order to procure the \$18,000 to be advanced toward the building, a loan of \$40,000 was obtained upon this property in November, 1892, and with that loan the mortgage debt previously existing against the property was paid off, and the balance, with additional funds furnished by Mrs. Dickinson, was used in the \$18,000 advancement to the tenant who was constructing the building. This \$40,000 mortgage remained on this property until a judgment for \$20,000 was obtained against Mr. Dickinson and his partner in 1893, which Mr. Dickinson had to pay. In order to pay that judgment \$90,000 was borrowed upon what is termed the State street and Cloud court property, the Sixty-third street property and the Clark street property. When this judgment was obtained Mrs. Dickinson claims to have become apprehensive about leaving her property in her husband's name, and on the 19th of December, 1893, the Sixty-third street property was conveyed to her, and on the 23d of December, 1893, the property now under consideration was conveyed to David G. Campbell by Mr. and Mrs. Dickinson, and by Campbell on the same day re-conveyed to Mrs. Dickinson, and she has held and controlled that property and received the rents from that time.

In the fall of 1891 a piece of property on Sixty-third street, which was included in another of the firm's option deals, was purchased and conveyed to Mr. Dickinson. It was one hundred and twenty-five feet square, comprising five lots. The property in that option was sold out, so that the firm made a profit of \$5000 in the whole deal. Mr. Dickinson testified that in order to close the transaction, his partner, Fuller, retained these lots without the payment of any cash, subject to the encumbrance, and that he bought them afterward from Fuller for \$10,000 or \$11,000 in cash, which he paid

with his wife's money. Fuller testified that the encumbrance was pretty near the amount the corner stood for in the option deal; that there was some balance, but he could not say how much, and according to his recollection he and Dickinson took them in closing the transaction and applied a balance of the profits from the sale of the other property as a cash payment. Snow, the other partner, testified that the cash payment was made out of the profits of the business of the firm. The property was vacant when purchased but it is now covered by buildings constructed by Mr. Dickinson. Subsequently this property was mortgaged with the State street and North Clark street property, and with the proceeds the other encumbrances were paid and the judgment against Mr. Dickinson for \$20,000 was settled. The State street property and Sixty-third street property are the ones which were conveyed to Campbell on December 19 and 23, 1893, and which Campbell conveyed to Mrs. Dickinson. A judgment had been obtained against Mr. Dickinson which was a lien on the property, and Mrs. Dickinson testified that the property was conveyed to her through Campbell to prevent further liens on her property which she would be compelled to pay.

In February, 1892, another loan of \$5000 was obtained on the North Clark street property, and with this money, or the rents, or both, Mr. Dickinson erected flats upon the rear of said property. He testified that these flats on the rear of the North Clark street property were erected with moneys which came either from revenues or from mortgages, but he was unable to state which. All of said property except that on Sixty-third street and the Barton lot was conveyed to Mrs. Dickinson by the quit-claim deeds just before the decree against Mr. Dickinson was entered. The value of the property in Dickinson's name at the time of the conveyance to his wife is not shown, the master not permitting evidence on that subject to be given. It appears, however, that the aggregate amount of loans secured upon the property is about \$150,000, and on the usual basis of loans of money the property is of

great value. The property was all acquired between November, 1889, and the year 1892. Mr. Dickinson was engaged in the real estate business during this time, and the evidence shows that the net income of his firm for the year 1889 was \$50,000, for 1890 \$100,000 and for 1891 \$47,000, of which he was entitled to nine-sixteenths, his net income from that business being about \$28,000 in 1889, \$56,000 in 1890 and \$26,000 in 1891. The rentals of the pieces of property went into the hands of the firm and payments on the investments were made with their checks. Certain books of the firm were produced, but they contained no account showing the facts. Mr. Dickinson testified that the accounts were not kept in the name of his wife but in the names of the different properties; that he had looked for other books of the firm but did not find them; that there were memorandum books in which items were set down, but not all of them; that he did not know where the books were and had not searched for them; that his wife kept a bank account at different times with different banks which he named; that there were no books kept which would show whether the buildings were the proceeds of the rents or income except the memorandum books, and that all the funds his firm collected from Mrs. Dickinson's property were put in the firm's bank account and checked out on her order. Mrs. Dickinson testified that she kept no bank account, but saved her income and her husband took charge of it; that it was all received by him and taken care of by him for her, and she could not tell whether it went into his bank account or not.

The quit-claim deeds made just before the entry of the decree against Mr. Dickinson were without consideration, and he and his wife agreed in testifying that they were made for the purpose of preventing a possible decree or judgment against him becoming a lien on the property. He held the legal title and had held it for many years. He had dealt with the property as his own, leased it, erected buildings on it and mortgaged it and executed the notes secured by the mort-

gage. To all appearances he was the legal owner and the conveyances were *prima facie* fraudulent. It devolved upon the defendants to prove that Mrs. Dickinson was the real owner of the property, that the alleged secret trust existed, and that the conveyances, confessedly made to prevent the collection of a possible judgment, were merely made to place in her the legal title to property of which she was already the equitable owner. The transactions were between husband and wife, where the greatest opportunities for fraud exist, and such transactions are to be closely scrutinized. Clear and satisfactory proof was required to establish the fact that property so held, managed and controlled by the husband was in fact the property of his wife. The evidence and explanation as to the North Clark street property were of that character, but as to subsequent transactions the evidence was both general and indefinite. It is not in the common experience that a moderate sum of money should develop in a few years into so much property and of so great value.

In considering the testimony of Mr. and Mrs. Dickinson it can make no difference that she was called as a witness by complainant. She was an adverse witness, and was not any the less testifying in her own interest or less influenced by such interest because she was called and examined by complainant. Her explanation of the reason for the conveyance to her of the Sixty-third street property on December 19, 1893, and the State street property on December 23, 1893, does not seem to be the correct one, for the reason that at the same time Mr. Dickinson held the title to all the other property which she now claims belongs to her and a judgment would be an apparent lien upon it. She testified that that property was conveyed to her to prevent further liens on her property which she would be compelled to pay. If that had been the reason, it seems that the rest of the property would also have been conveyed to her unless at the time she did not consider herself the owner of it. It does not appear, however, that the conveyance of those properties impaired the

ability of Mr. Dickinson to pay his debts. The indebtedness on which complainant's decree was based accrued from 1892 to 1894, but apparently he still had property sufficient to meet all his obligations. At any rate there is no evidence to the contrary. The evidence would not justify a conclusion that the conveyances in 1893, if regarded as voluntary, were fraudulent as against the complainant. Except as to the Sixty-third street property and the North Clark street property, and the State street property, we think the decree was wrong.

Mrs. Dickinson testified, in a general way, that as she understood it the property was all bought with her funds, but she knew practically nothing about any of the transactions. She testified that the property was taken in trust by her husband, and that it was paid for, as she understood, in some way with her money or with income from rents and mortgages on her property, and that the title was placed in her husband so that it could be handled better and larger mortgages could be made. She testified that her husband dealt in tax titles for her and made money for her in that way, but she did not know how much; that he bought tax titles and handled the business and that she left everything to his care; that she did not know how much money she had at the time any of the purchases were made; that she did not know the amount paid for any piece of property, the cost of any improvement, the amount of rents, or the taxes, assessments or carrying charges against the property. She said that her husband received her money and took care of it, telling her from time to time the amount she had; that she did not know whether money of her husband or any of the profits of his firm went into any of the property or not, and that all she knew was that the property was bought and improved from amounts saved from her income and raised by mortgages on her property.

A married woman may make her husband her agent for the management of her property, and he may perform ordinary and reasonable services for her without compensation

without subjecting her property to the claim of his creditors. (*Mali v. Spencer*, 186 Ill. 363.) If this agency is actual and *bona fide*, he may lease her property, collect rents or invest her money or change her investments by her authority without subjecting the property to his debts. On the other hand, she cannot, under the guise of an agency, appropriate to herself the results of the time, labor and skill of her husband to the exclusion of his creditors. (*Wortman v. Price*, 47 Ill. 22.) Manifestly, whether the whole of the husband's time is so devoted, or a substantial part of it, is not decisive of the question, if the increase, growth or profits are the result of his skill, labor and industry. It is beyond doubt that the unusual accumulation of property in this case from small beginnings was to a large extent the result of the skill, experience and diligence of Mr. Dickinson during the years in which the property stood in his name and while he managed it ostensibly as his own, even if he did not put any of his own money into it. He did not confine himself to acting as the agent of his wife or under her authority, but transacted all the business as if acting for himself, seeking new investments and making them, while she had no knowledge of what is now alleged to be her own business, except in the most general and indefinite way. His business experience, knowledge of real estate and management of the business, with the opportunities afforded him through his firm, contributed a material part of the increase and growth of the property, if not the greater part of it. During the time the property was acquired he was in receipt of a very large income, and his subsequent insolvency is wholly unexplained. The clear and satisfactory proof required of the defendants was not made. If any books were kept showing the transactions and the sources from which the property came, and that none of his money went into the property, they were not produced and neither was any bank account shown. Mr. Dickinson, in his testimony, said nothing about the tax title business which his wife said he carried on for her and with her money. He

testified that when he took the title to property he made out a little slip of paper showing that his wife was the owner of the property, which he either gave to his wife or put with the deeds. Mrs. Dickinson testified that she did not know of any such writing, and none was found.

Our conclusion is that the conveyances of property to Mrs. Dickinson, except the North Clark street property, the State street and Cloud court property and the Sixty-third street property, are fraudulent as against the rights of the complainant, and should be set aside and the property subjected to the payment of the decree in favor of complainant.

The judgment of the Appellate Court and the decree of the superior court are therefore reversed and the cause is remanded to the superior court, with directions to enter a decree in accordance with the views herein expressed.

Reversed and remanded, with directions.

H. H. HARRIS *et al.*

v.

THE CITY OF MACOMB.

Opinion filed December 22, 1904.

SPECIAL ASSESSMENTS—*when a railroad company cannot be assessed for pavement.* A street railway ordinance which requires the company to pave at its own cost the space between its rails when any street in which its tracks are laid is paved by the city, does not authorize a special assessment against the company for a pavement on a street wherein it has the right to lay its tracks but in which no track has been laid.

APPEAL from the County Court of McDonough county;
the Hon. W. J. FRANKLIN, Judge, presiding.

ELTING & O'HARRA, and H. H. HARRIS, for appellants.

CONRAD G. GUMBART, City Attorney, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This was a petition for the confirmation of a special assessment levied for the purpose of defraying the expense of grading, curbing and paving West Jackson street, in the appellee city, in pursuance of an ordinance of the city council. The appellants objected that the ordinance, estimate of the cost of the proposed improvement and the assessment roll were void, for the alleged reason that the ordinance provided for, and the estimate and assessment roll included, the cost of grading and paving one block of said West Jackson street which the Macomb and Western Illinois Railway Company was, under the terms and conditions of the license granted it by the city of Macomb, required to grade and pave at its cost. The objection was overruled and judgment confirming the assessment entered, from which this appeal has been perfected.

The ordinance authorizing the improvement to be made was adopted June 6, 1904. On May 6, 1903, the city adopted an ordinance authorizing the Macomb and Western Illinois Railway Company to construct, and to maintain and operate for the period of twenty years, its railroad in and along certain of the streets of the city, including therein one block in and along West Jackson street. The railroad company had constructed its track in and along Johnson street to the intersection of that street and said Jackson street, and to the center of the intersection, before the ordinance authorizing the improvement of the street was adopted. It seems, however, that the track across, or partly across, Jackson street was but a temporary track, laid for the purpose of conveying material used in the construction of the road, and that aside from this temporary track the company had not occupied Jackson street. The contention of the appellants was and is, that, nevertheless, the railroad company had, and for the remainder of the term of the license will have, authority, under the ordinance of May 6, 1903, to construct and operate its road in and along and upon the said block in Jackson

street, and may at any time avail of that privilege and license and construct its tracks along Jackson street, in which event, appellants insist, the burden of paving that part of the street that will be between the rails of the tracks of the railroad company will have been borne by the appellants and other owners of property assessed to pay the expense of the improvement, and that the railroad company will be relieved from the performance of one of the conditions of the ordinance authorizing it to occupy and use the street.

The obligations of the railroad company are to be found in sections 9, 10 and 11 of the ordinance conferring the license on the company to build and operate its railroad in and along the streets of the city. These sections are as follows:

"Sec. 9. In case said city of Macomb shall, at any time hereafter, pave the surface of any street, or any portion thereof, along which said railroad or street railroad may run, said company shall pave the space between the rails of its tracks and keep the same in repair so that it shall correspond with such paving. All of such paving shall be done under the supervision of the city engineer.

"Sec. 10. The space between the rails of said street railroad on all streets, whether improved or not, shall be kept by said company, its successors and assigns, in good repair, and at street intersections not paved, said company, its successors and assigns, shall make, with hard brick or plank, a good crossing over said track or tracks and keep the same in repair.

"Sec. 11. On all paved streets, when the paving is taken up by said company for the purpose of laying or repairing tracks, switches or turn-outs, the said pavement shall be replaced by said company at their cost, in good condition; and when said pavement is damaged, either inside or outside of said track, by reason of the repairing, laying or re-laying of said tracks, switches or turn-outs, or by reason of the running of cars over said streets where paving is laid, said company shall repair said pavement at their cost."

Section 9 relates to the duties imposed on the railroad company in the event the city shall determine to pave a street in and along which the railroad company has previously constructed its railroad, and has no application to the present investigation. The words "may run," in this section, very plainly mean streets whereon the track of the railroad company shall have been constructed,—not streets whereon the company has the right or license to operate its road but of which right or license it has not availed itself. Section 10 is likewise without application. Its provisions relate only to the duty of the railroad company with reference to the care of the space between the rails of its tracks in all streets in and along which it should thereafter lay the tracks of its road. Section 11 controls the course and duty of the railroad company when it shall construct its tracks in and along a street that has been paved. If the railroad company shall hereafter determine to lay its tracks in and along that portion of West Jackson street after it has been paved, under the judgment of confirmation here appealed from section 11 will then apply, and direct the duty of the railroad company in the matter of repairing and restoring the paving. The provisions of section 10, as to the duty of the company to keep the space between its tracks in good repair, will also become applicable if the tracks of the company are laid on West Jackson street.

The trial court correctly held that the provisions of the ordinance did not authorize the assessment of any portion of the cost of improving West Jackson street against the property of the railroad company.

The judgment is affirmed.

Judgment affirmed.

DICKY & BAKER *et al.*

v.

THE PEOPLE *ex rel.* John J. Hanberg, County Treasurer.

Opinion filed December 22, 1904.

1. JURISDICTION—*when objection is waived by appearance.* Discrepancies between the names published in the application for judgment of sale and those given in the judgment, sale and redemption record are waived by general appearance of the parties and the filing of objections calling for the exercise of jurisdiction by the court and a decision on the merits.

2. SPECIAL ASSESSMENTS—*it is not proper to enter two judgments against same lots.* After judgment of sale for a delinquent special assessment has been entered, the court is without power to enter a second judgment against the same lots, even though the first judgment is invalid because not signed by the judge, where the second judgment does not purport to be an amendment or correction of the first.

APPEAL from the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

GEORGE W. WILBUR, for appellants.

WM. M. PINDELL, (EDGAR BRONSON TOLMAN, Corporation Counsel, and ROBT. REDFIELD, of counsel,) for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The county collector of Cook county applied to the county court for judgment against appellants' lots and an order of sale for a delinquent special assessment. The appellants appeared and filed objections to the application, which were heard and overruled by the court. They contend that the court erred because their names as published in the notice of the application were not correct and did not correspond with the names as given in the judgment, sale and redemption record, so that the notice did not give the court jurisdiction over them. This objection was waived by the general appear-

ance entered in the case by the appellants. They filed seven objections to the application, some of which called for the exercise of jurisdiction by the court and a decision upon the merits. The entry of such an appearance gave the court jurisdiction of appellants. *Nichols v. People*, 165 Ill. 502.

On August 3, 1904, the objections of appellants were overruled and judgment was entered against their lots, which were severally ordered to be sold to satisfy the amount of the assessment and costs. Upon the entry of the judgment an appeal was prayed and allowed. It is objected that said judgment was not in proper form, but we find it substantially in the form directed by section 191 of the Revenue act and sufficient in that respect. It was not signed by the judge as required by that section, and for that reason it must be reversed. The record contains another judgment entered some days after the judgment against appellants' lots, which seems to cover the whole delinquent list, including said lots. The second judgment is signed by the judge, and counsel for the appellee contend that it is a valid judgment. It is not proper to enter two judgments against the same lot for the same tax or assessment, although counsel for appellee say that such has been the practice in contested cases in the county court of Cook county. If the statements of counsel are correct, there is great laxity and confusion in keeping the records of that court. It is clear, however, that the power of the court was exhausted by the first judgment, except for the purpose of amending or correcting the judgment during the term, and the second judgment does not purport to be an amendment or correction of the first judgment. It was error to enter the second judgment. There was no error in overruling the objections, but the judgments entered are erroneous.

The judgments against appellants' lots are reversed and the cause is remanded to the county court, with directions to enter a proper judgment as directed by section 191 of the Revenue act,

Reversed and remanded,

THOMAS G. DAY

v.

CARRIE DAVIS *et al.**Opinion filed December 22, 1904.*

1. APPEALS AND ERRORS—*no presumption of error obtains in absence of complete record.* In the absence of a complete record in a chancery case no presumption of error obtains, but the presumptions are in favor of regular and correct action on the part of the chancellor.

2. SAME—*duty of plaintiff in error to bring up record.* While it is not the duty of the defeated party in a chancery case to see that the oral proof is preserved by a certificate of evidence or by recitals in the decree, yet on appeal or error by him he should bring up all the evidence that is so preserved before he can insist that the decree is not supported thereby.

3. SAME—*section 67 of Practice act governs appeal in building and loan receivership.* The right of appeal from a final order in a building and loan association receivership is governed by section 67 of the Practice act, under which it is error for the chancellor to require the appeal bond to be filed within five days.

4. SAME—*matter of costs is discretionary in case of partial reversal.* In case of a partial reversal the costs may be apportioned as the reviewing court, in its discretion, shall deem just and proper.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on writ of error to the Superior Court of Cook county; the Hon. PHILIP STEIN, Judge, presiding.

EDWY LOGAN REEVES, for plaintiff in error.

S. W. SWABEY, for defendant in error H. W. Wolseley.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The superior court of Cook county, under a bill in equity filed by Carrie Davis and others, entered a decree placing the Pacific Loan and Homestead Association in the hands of a receiver. During the course of the administration of the affairs of the association by the receiver the Assets Re-

alization Company tendered to the receiver a bid of \$120,000 for the remaining assets and property of the association, (except certain assets and property in the bid specified,) and the court ordered the bid should be accepted unless good objections should be made within fifteen days thereafter. Notice of the proposed sale of such assets so remaining in the hands of the receiver, and that objections thereto might be interposed within fifteen days, was given by publication in a newspaper in the city of Chicago, and by notices thereof sent by mail to each holder of stock and each creditor of the association. The plaintiff in error appeared and filed objections to the approval of the bid of the Assets Realization Company. On the hearing the objections were overruled and an order was entered directing the receiver to sell the assets so specified in the bid of the Assets Realization Company, for the sum of \$120,000. The plaintiff in error prayed and was granted an appeal on giving an appeal bond in an amount fixed and within a time specified by the court. He did not comply with the conditions of the order granting him an appeal, but subsequently sued a writ of error out of the Appellate Court for the First District, and to reverse an adverse judgment entered in that court on the hearing of such writ of error, has brought the record into review in this court by this writ of error.

It appears from the transcript of the record of the proceedings that the superior court heard oral evidence bearing on the question of the approval or disapproval of the bid of the Assets Realization Company for the property ordered to be sold to it. The record does not contain this oral evidence. The certificate of the clerk which is attached to the transcript of the record does not purport to certify that the transcript is a full and complete transcript, but only that it is full and complete as per the *præcipe* on file herein. The *præcipe* does not ask that a complete record should be made, but directs the clerk to make an authenticated transcript of part of the record of the above entitled "cause," and "to insert therein

the following." Then follows in the *præcipe* an enumeration of certain papers filed and orders entered, not including a certificate of evidence.

The proceeding being in chancery, the rule is that the decree must be supported either by a certificate of the oral evidence heard in the cause, or by recitals in the decree of the facts found by the court to be established by the evidence. The decree does not recite the facts established by the evidence. Whether a certificate of such proof is on file, and consequently a part of the record of the cause, we cannot know, for the plaintiff in error has chosen not to bring the entire record before us. We know from so much of the record as we have, that the court heard oral testimony on the question whether it would be for the best interests of those interested that the bid of the Assets Realization Company should be accepted, and that the proofs thus heard operated to convince the mind of the chancellor that the bid should be approved and the property disposed of accordingly. The proof may, for aught we know, have been incorporated in a certificate of evidence, and if so, it composes a part of the record of the cause. While it was not the duty of the plaintiff in error to see that the oral proof was preserved either by a certificate of evidence or by a recital of findings in the decree, it was his duty to bring before us all that is in the record on that point before he can ask us to declare that the chancellor erred in ordering that the property should be sold. If we had a complete record of the cause before us and it should not appear from it that the oral evidence had been preserved, then, unless the decree contained recitals of findings of fact sufficient to sustain the relief granted, the plaintiff in error might insist upon a reversal. In the absence of a complete record no presumption of error obtains, but the presumptions are in favor of regular and correct action on the part of the chancellor.

The hearing of the objections of the plaintiff in the proposed sale of the assets was set for March 30, 1900. On

March 29, 1900, one L. D. McCall, in open court, submitted a bid of \$130,000 for certain of the assets in the hands of the receiver, and tendered a certified check for \$5000 as "earnest money" or as evidence of good faith in making the bid. The hearing of objections to the bid of the Assets Realization Company and consideration of the bid of McCall were continued until March 31 and heard and disposed of together. The court ordered that the objections to the bid of the Assets Realization Company should be overruled and that the property should be sold to the realization company. It is urged the court erred in rejecting the bid of McCall.

The bid of McCall was for what purports to be the same property previously bid for by the Assets Realization Company, but has a number of conditions to the bid and uses many general terms and expressions not contained in the latter bid, and thus leaves it doubtful, to say the least, whether his bid is for the same property, and no more, that is described in the other bid. His bid is also conditioned for the payment of taxes and special assessments of the years 1898 and 1899 by the receiver; that a merchantable title shall be conveyed to all the property, subject to certain liens specified in his bid; also that the titles of said property should be clear and free of all encumbrances, except as specified; that the interest in or liens upon said real estate should be exempt from legal entanglement; also, the bid is subject to numerous other conditions which are needless to be mentioned. Suffice it to say, they so involve the bid that we are unable to determine, and it is scarcely conceivable that the chancellor could have told with any certainty, whether the bid was any more favorable than the one which was accepted. The record discloses that the creditors of the association, twenty-two in number, the total of whose claims aggregated the sum of \$168,802.02, desired that the bid of the Assets Realization Company should be accepted and approved by the court, and that the plaintiff in error was the only objector thereto. The record is insufficient to establish that the

court erred in ordering the sale of the property to the realization company.

The plaintiff in error urges that the court erred in prescribing the amount of the appeal bond and in fixing the time in which the bond should be given. The order granting an appeal was on condition that the plaintiff in error should, within five days thereafter, file an appeal bond in the sum of \$50,000, with sureties to be approved by the court. The proceeding in which the receiver was appointed was instituted under the provisions of an act entitled "An act to enable associations of persons to become a body corporate to raise funds to be loaned only among the members of such association," in force July 1, 1879. (Hurd's Stat. 1899, p. 450.) Section 25 of the act (par. 91*p*, p. 458,) authorizes petitions to be filed for the appointment of receivers for such associations, and provides that proceedings under such petitions shall "proceed as other causes in equity." We do not find in said act any special provisions for appeals from the orders or decrees entered in such proceedings. The order of the court herein was final and appealable. Section 67 of the Practice act (3 Starr & Cur. Stat. par. 68, p. 3094,) afforded the plaintiff in error the right to appeal from the order or decree of the court, and prescribed the conditions which the court might impose as a prerequisite to the exercise of the right of appeal. The time in which an appeal bond shall be filed is one of the conditions which this statute regulates, and the statute provides that the time which the court may fix within which the bond must be filed shall not be less than twenty days. In the case at bar the appeal was granted on condition an appeal bond should be filed in five days. This restriction as to the time in which the bond should be filed, contained in the order granting the appeal, was in violation of the express provision of the statute, and was therefore erroneous, and is reversed.

The plaintiff in error has enjoyed the right to present his case herein for review to the Appellate Court and to this

court as fully as if he had brought the record in review by appeal, and as he has failed to make it appear the superior court erred in ordering the property to be sold to the Assets Realization Company, the decree, in all respects other than as to the order limiting the time for presenting an appeal bond, should be and it is affirmed. This judgment of affirmance determines the case upon the merits, and to that extent concludes the plaintiff in error. A reversal of that portion of the order of the superior court which erroneously limits the time for presenting an appeal bond to five days would be barren of any benefit to the plaintiff in error. The reversal of a decree in part does not necessarily entitle the plaintiff in error to a judgment for all or any part of the costs by him expended or to be relieved from the liability to pay costs incurred by his adversary. The costs may, in case of partial reversal, be ordered paid as the reviewing court may, in its discretion, determine to be proper and just. *Moore v. People*, 108 Ill. 484; *Romberg v. McCormick*, 194 id. 205.

Proofs submitted by the defendant in error receiver in support of the motion hereinbefore entered by him to dismiss the writ, discloses that the plaintiff in error did not sue out this writ until September 10, 1901,—about one and a half years after the assets of the association had been disposed of under the order of the court that he desired to have reversed and more than eight months after the receiver had presented his final report and had been discharged from further duty in the premises, as the plaintiff well knew. The plaintiff in error procured the writ of error to issue only against Carrie Davis and Henry W. Wolseley. The former was one of the petitioners in the bill asking for the appointment of a receiver for the association and the latter was the receiver. No service was had on Mrs. Davis, and no reason could be suggested for taxing costs to her had she been served. It would be unjust, under all the circumstances, to tax costs to the receiver or to deny to him recovery of costs which he may have been forced to pay.

The order and decree of the superior court are affirmed in part and in part reversed. The costs will be taxed to and paid by the plaintiff in error.

Affirmed in part and in part reversed.

THE LIVINGSTON COUNTY BUILDING AND LOAN ASS'N

v.

ANNA L. KEACH *et al.*

Opinion filed December 22, 1904.

1. APPEALS AND ERRORS—*order sustaining demurrer to bill is not a final one.* An order sustaining a demurrer to a bill is not a final order, and no appeal lies therefrom.

2. SAME—*when appeal bond does not show that bill was dismissed.* An approval by the clerk of the court of an appeal bond reciting that complainant's bill was dismissed does not show that a decree dismissing the bill was entered.

APPEAL from the Circuit Court of Livingston county;
the Hon. GEORGE W. PATTON, Judge, presiding.

A. C. NORTON, and C. J. AHERN, for appellant.

FRED G. WHITE, and C. C. & L. F. STRAWN, for appellees.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The original bill in this case was filed by the appellant against the appellees, Anna L. Keach and Fanny L. White. Subsequently an amended bill was filed by appellant against the same parties, to which demurrers were filed by the appellees, Keach and White. These demurrers were sustained, but no order was entered by the court dismissing the bill. The order sustaining the demurrers is not a final order, and, therefore, no appeal lies from it to this court. The recital in

the record is as follows: "This cause coming on to be heard on demurrer to bill herein, and after arguments of counsel and due deliberation by the court, it is considered and ordered that said demurrer be and the same is hereby sustained, to which ruling of the court complainant excepts, and prays an appeal to the Supreme Court of this State, which is allowed upon filing bond in the sum of \$100.00 to be approved by the clerk of this court within thirty days from this date." It is true that the appeal bond, filed in the cause, recites in the condition thereof that appellees did, on June 7, 1904, obtain a decree against the appellant, dismissing its bill of complaint, and sustaining a demurrer thereto. But the statement in the condition of the appeal bond, that a decree was entered dismissing the bill does not show that any such decree was actually entered. The order of the court granting the appeal was that the bond was to be approved by the clerk of the court. The bond shows, by endorsement on its back, that it was filed and approved by the clerk. An approval by the clerk of the court of an appeal bond, containing a recital that the bill was dismissed, does not make it true that there was such dismissal. The clerk has no judicial power, and could not enter such a decree of dismissal.

In *Williams v. Chicago Exhibition Co.* 188 Ill. 19, we said (p. 26): "Where a complainant is willing to rest his case upon a demurrer, he must move the court to dismiss the bill. An order dismissing the bill is final, and from it appeal or error will lie, but a decision on the demurrer is merely interlocutory." (See, also, *Titus v. Mabee*, 25 Ill. 232; *Prout v. Lomer*, 79 id. 331; *Weaver v. Poyer*, 70 id. 567).

As the present appeal is prosecuted from an interlocutory order merely, it must be and is dismissed.

Appeal dismissed.

GARRETT K. ZIEGLER *et al.*

v.

THE CITY OF CHICAGO.

Opinion filed December 22, 1904.

1. SPECIAL ASSESSMENTS—*first resolution need not state how improvement is to be paid for.* The law does not require the first resolution for an improvement to state how the improvement is to be paid for in order that a property owner may be advised of the probable cost thereof to him individually.

2. SAME—*engineer's signature to estimate need not be incorporated in record of first resolution.* If the engineer's estimate of cost, itemized to the satisfaction of the board, is incorporated in the record of the first resolution, it is not essential that other parts of the engineer's report, including his signature, be so incorporated.

APPEAL from the County Court of Cook county; the Hon. L. C. RUTH, Judge, presiding.

TAYLOR & MARTIN, for appellants.

ROBERT REDFIELD, and FRANK JOHNSTON, Jr., (EDGAR BRONSON TOLMAN, Corporation Counsel, of counsel,) for appellee.

Mr. CHIEF JUSTICE RICKS delivered the opinion of the court:

This appeal is from the judgment of confirmation of the county court of Cook county of a special assessment levied for the improvement, by curbing, grading, paving, etc., of Champlain avenue from Forty-sixth street to Fiftieth street, in Chicago.

Two grounds for objection are urged, viz.: "(1) The resolution passed by the board of local improvements should specify, in terms, whether the improvement is to be made by special assessment or special taxation or partly by special assessment or partly by special taxation; (2) the estimate which is required to be itemized and made a part of the reso-

lution should be incorporated in the record of the resolution, over the signature of the engineer of the board of local improvements."

The appellee questions the sufficiency of the objections made in the court below to raise the points here urged. We will not enter into a discussion of them from this point of view, but deem it sufficient to say that we deem them broad enough to cover said matters.

This proceeding was under the Local Improvement act of 1897, and the amendments thereto. (Hurd's Stat. 1903, p. 390.) Section 5 of the act is as follows: "No ordinance for any local improvements, to be paid wholly or in part by special assessment or special taxation, shall be considered or passed by the city council or board of trustees of any such city, village or town, unless the same shall first be recommended by the board of local improvements provided for by this act."

Section 7, so far as material to the matters here under consideration, provides: "All ordinances for local improvement to be paid for wholly or in part by special assessment or special taxation, shall originate with the board of local improvements. Petitions for any such public improvement shall be addressed to said board. Said board shall have the power to originate a scheme for any local improvement, to be paid for by special assessment or special tax, either with or without a petition, and in either case shall adopt a resolution describing the proposed improvement, which resolution shall be at once transcribed into the records of the board. Whenever the proposed improvement will require that private property be taken or damaged, such resolution shall describe the property proposed to be taken for that purpose. Said board shall, by the same resolution, fix a day and hour for the public consideration thereof, which shall not be less than ten days after the adoption of such resolution. Said board shall also cause an estimate of the cost of such improvement * * * to be made in writing by the engineer,

* * * over his signature, which shall be itemized to the satisfaction of said board, and which shall be made a part of the record of such resolution."

Section 8 provides for the public hearing on three subjects only,—the necessity, the nature and the estimated cost of the proposed improvement,—and then authorizes the board, upon objections to the proposed improvement, to pass a new resolution abandoning the scheme, modifying the same or adhering thereto, and concludes: "Thereupon, if the said proposed improvement be not abandoned, the said board shall cause an ordinance to be prepared therefor, to be submitted to the council or board of trustees. * * * Such ordinance shall prescribe the nature, character, locality and description of such improvement and shall provide whether the same shall be made wholly or in part by special assessment or special taxation of contiguous property; and, if in part only, shall so state."

Section 9 provides for the presentation of the ordinance to the council and the recommendation of the board, and concludes: "The recommendation by said board, shall be *prima facie* evidence that all the preliminary requirements of the law have been complied with, and if a variance be shown on the proceedings in the court, it shall not affect the validity of the proceeding, unless the court shall deem the same willful or substantial."

Section 10 requires that the ordinance and recommendation of the board and an itemized estimate of the cost of the improvement of the engineer, over his signature and certifying that in his opinion the cost of the improvement will not exceed the estimated cost, shall also be transmitted to the council.

The above are all the sections and provisions of the act that could in any manner apply to the questions here presented. We find in no place in these provisions the requirement that the board of local improvements shall include in the first, or any, resolution to be entered by it the statement of

the manner in which the improvement shall be paid for. The requirements of the first resolution are expressly mentioned and specified in section 7, *supra*. Those requirements are, (1) that it shall describe the proposed improvement; (2) if private property is to be taken or damaged it shall describe such property; (3) it shall "fix a day and hour for the public consideration thereof;" (4) and the itemized estimate of the cost of the improvement shall be made a part of the record of such resolution.

It is admitted by appellants that the resolution contains all the foregoing specified matters except the report of the engineer, which, they insist, shall be incorporated at large, including the signature, in the resolution. They admit that the estimate is included in the resolution, but urge that the omission to include the signature is a failure to comply with the statute and is fatal to the proceeding. Appellants also urge that the logic and reason of the law require that the board should state in the resolution whether the improvement is to be paid for by special assessment or special taxation, because the tax-payer has a right to know the cost to him of the improvement, and that as by special taxation the cost would all fall upon the contiguous property and under special assessment it might include property benefited but not contiguous, he cannot estimate the cost to him until he knows the method adopted for adjusting the cost.

To this it might be replied that if the method of special assessment is to be adopted the property owner would not ascertain the cost to him until the assessor has designated the property which he deems benefited by the improvement and the assessment is confirmed by the court; and if special taxation is the method chosen, he could not tell if it is upon the basis of value or proportionate frontage, but might determine the cost to him in the single instance of taxing the whole cost of the improvement to the property opposite to it, which is only one of the three methods authorized to be used in special taxation.

But we think appellants are in error in their contention that the property owner is entitled to be advised, by the first resolution, as to the cost of the improvement to him. The estimate required is as to the cost of the improvement,—not to the individual or any number of them less than the whole,—and on the public hearing he is entitled to object to the cost, the necessity for and the nature of the improvement. By the report of the engineer the property owner is advised of the total estimated cost of the improvement, and by the resolution and the estimate he is advised of the character and kind of materials that enter into the improvement and the estimated cost of each item thereof. Having this before him and objecting to the cost of the improvement, he may show, if he can, that the materials specified in the resolution and contained in the estimate, or either of them, are under the control of a monopoly, and that therefore the cost and the estimate thereof are higher or greater than they should be and than would be the cost of a similar amount of similar material bearing a different name or obtained from a different source, or he may show, if he can, that, taking the location and the purpose of the improvement into consideration, the stage of improvement in the district along which it is to be made, the uses to which it is to be put, taking its cost into consideration, it is unsuited for the purpose and place designated or that the cost of the improvement will exceed the benefits. But, surely, it was not intended that the property owner, by objecting that he was possessed of a single lot along the line of a long improvement and that his lot would not be benefited by and did not need and could not utilize the improvement proposed, could claim that the cost of the improvement would be too great and the improvement for that reason should not be made; and yet such contention would be as reasonable as to contend that at the preliminary hearing the individual owner should be allowed to urge the cost to him as a ground for defeating the improvement. Questions of that character would properly arise when the ques-

tion of benefits came to be considered. The proceeding being a purely statutory one and the act being treated as valid, the courts are not authorized to read into the act matters which they think ought to be but are not there.

The first time the method of raising the funds for payment of the improvement is required to be provided for or appear in the proceeding is in the ordinance for the improvement. This ordinance must originate with the board of local improvements and be forwarded by it to the council, with its recommendation and the estimate of the engineer. In this case the ordinance complies with the statute, and as the board of local improvements in each step complied with the statute in the matter of time and manner of determining the method of fixing the charge of the cost of the improvement upon the property, it must be sustained.

Nor do we think a reasonable construction of the statute, or the plain reading of it without construction, requires that the entire report of the engineer, including the general remarks and signature, shall be incorporated in the resolution or recorded as a part of it. The particular thing the statute names is the itemized estimate of the cost of the improvement, and we have sustained many cases since *Bickerdike v. City of Chicago*, 203 Ill. 636, without more appearing. The resolution states that it contains or is followed by the estimate of the engineer. It is not contended that no estimate was made or that the estimate as made does not correctly appear in the resolution, and if the language of section 7 should be so construed as to hold that the entire report of the engineer should be incorporated in the first resolution, under the saving clause quoted from section 9 of the statute we would be disposed to regard it as but a variance in the record that did not affect the validity of the proceeding and was not willful and substantial, in which case the provision is that it shall not affect the proceeding.

The judgment of the county court is affirmed.

Judgment affirmed.

THE ILLINOIS, IOWA AND MINNESOTA RAILWAY COMPANY

v.

MARY POWERS *et al.*

Opinion filed December 22, 1904.

1. APPEALS AND ERRORS—*Supreme Court may look to record to determine certainty of verdict.* In determining whether a verdict is sufficiently certain in amount to support the judgment entered the Supreme Court may look into the entire record, and if the uncertainty is thereby removed the judgment will be sustained.

2. VERDICT—*when verdict will be held to be sufficiently certain.* A condemnation verdict for "the sum of (\$2600.00) twenty-six and no-100 dollars," will be held to be sufficiently certain on appeal, where the bill of exceptions in the record shows that the judge read the verdict to the jury the same as if it were written \$2600, and inquired if that was their verdict, to which they all assented.

APPEAL from the County Court of DeKalb county; the Hon. W. L. POND, Judge, presiding.

This was a proceeding under the Eminent Domain act, commenced in the county court of DeKalb county by the appellant to acquire a right of way across the farm of appellees. The appellees filed a cross-petition claiming damages to lands not taken. The jury returned a verdict in writing, fixing the value of the land taken at \$563.75 and the damages to land not taken at "the sum of (\$2600.00) twenty-six and no-100 dollars." The bill of exceptions shows when the verdict was returned into court the judge read the same to the jury as though it was written damages to the land not taken \$2600, and thereupon inquired of the jury if the verdict as read was their verdict, to which they all assented.

MURPHY & ALSCHULER, (D. J. CARNES, and A. W. FISK, of counsel,) for appellant.

CLIFFE & CLIFFE, for appellees.

Mr. JUSTICE HAND delivered the opinion of the court:

The only reason urged in this court as a ground for a reversal is that the verdict is too uncertain to sustain the judgment.

In *Griffin v. Larned*, 111 Ill. 432, which was assumpsit upon a promissory note, the jury returned a verdict for "fourteen hundred and sixty-seven and eighty-eight cents." The verdict, upon its return into court, was read by the clerk to the jury "fourteen hundred and sixty-seven dollars and eighty-eight cents," and the court then and there inquired of the jury if the verdict as read was their verdict, and the jury, through their foreman, replied it was, and it was held the verdict as read by the clerk was the verdict of the jury, and was sufficient to support a judgment in favor of the plaintiff and against the defendant for \$1467.88. That case differs from this case in this: In a condemnation proceeding the statute provides the verdict of the jury shall be in writing, while in an assumpsit suit it is not necessary that the verdict should be in writing, but the same may be announced by word of mouth, in open court, by the foreman of the jury. We think, however, this court, in passing upon the question whether a verdict is sufficiently certain and specific in amount to support the judgment rendered thereon by the trial court, may look into the entire record, and if from other portions of the record any uncertainty as to amount in the verdict is rendered certain and specific, the judgment should be sustained.

In the case of *West v. Americus Bank*, 63 Ga. 230, the verdict was for the plaintiff for "eighteen 1800 dollars," and the defendant contended that the word "eighteen" qualified the word "dollars," and that the verdict should be read leaving out the figures "1800." The pleadings showed that \$1800 was the sum sued for, and it was held proper to read the verdict in the light of the pleadings and to enter a judgment for \$1800.

In the case at bar, upon its return the verdict may be conceded to have been uncertain as to amount. The judge, however, then and there read the verdict to the jury in accordance with the amount stated therein in figures, and inquired of the jury if the verdict as read by him was their verdict, to which they replied affirmatively. The action of the court and the reply of the jury removed from the verdict what before had made it uncertain, and made it certain and specific as to amount, and the court having rendered judgment upon the verdict for the amount stated by the jury in open court to be the amount of damages allowed the appellees for land not taken, and the court having preserved a record of its action and that of the jury at the time the verdict was returned into open court, by bill of exceptions, the verdict as to the amount allowed for damages to land not taken no longer was uncertain but was thereby rendered certain and specific.

The authorities relied upon by the appellant are cases where the amount of a verdict as stated in figures did not agree with the amount stated therein in words, and the record contained no fact or facts which rendered the verdict certain as to amount. Those cases differ from this case materially and are not in point.

We are of the opinion the action taken in court at the time the verdict was returned, as shown by the bill of exceptions, cured any uncertainty in the amount of the verdict, and that the county court did not err in rendering judgment thereon in favor of the appellees for damages to lands not taken, for the sum of \$2600.

The judgment of the county court will be affirmed.

Judgment affirmed.

LIZZIE WENOM

*v.*HENRY FOSSICK *et al.**Opinion filed December 22, 1904.*

JUDGMENTS AND DECREES—*when judgment is not final.* A judgment against the plaintiff for costs upon his electing to stand by his overruled demurrer to the special pleas is not a final judgment where two pleas of the general issue filed by the defendants are undisposed of, there being no terms in the judgment disposing of the entire subject matter of the litigation.

WRIT OF ERROR to the Appellate Court for the Fourth District;—heard in that court on writ of error to the Circuit Court of Madison county; the Hon. B. R. BURROUGHS, Judge, presiding.

B. H. CANBY, for plaintiff in error.

BURTON & WHEELER, for defendants in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

On March 27, 1903, defendants in error recovered a judgment against plaintiff in error in the circuit court of Madison county for costs of suit. For the purpose of having that judgment reviewed, plaintiff in error sued out a writ of error from the Appellate Court for the Fourth District. That court dismissed the writ, assigning as a reason therefor, that the judgment in question was not a final judgment, and the cause comes to this court upon a writ of error.

Lizzie Wenom, the plaintiff in error, brought suit against Henry Fossick and Julius Rosenberg, defendants in error, in trespass. Her declaration, which was filed on April 24, 1902, contained but one count, and charged defendants in error with having broken and entered her house. Each of the defendants filed a plea of the general issue, and such proceedings were had in the cause that on March 27, 1903, in

addition to the pleas of the general issue, defendants had on file certain special pleas, which may be designated as Rosenberg's second amended plea, Fossick's second amended plea, Fossick's third special plea, and the joint and additional plea of both defendants. On that day the plaintiff interposed a general demurrer to all of these special pleas, which were the only special pleas on file. The court overruled this demurrer, the plaintiff elected to abide the demurrer, and the following judgment was entered:

"On this day come the parties by their attorneys, and the court hears argument of counsel on demurrer to two pleas as amended, and to additional pleas, and being sufficiently advised overrules said demurrer, and plaintiff by attorney excepts and elects to stand by demurrer. It is therefore considered and ordered by the court that the defendants have judgment for and recover of and from the plaintiff their proper costs in this behalf expended and have execution therefor. Plaintiff prays an appeal to the Appellate Court, Fourth District of the State of Illinois, which is allowed upon her entering into bond in the sum of \$100 with security to be approved by the clerk of this court. Bond and bill of exceptions to be filed in thirty days."

It will be observed that this judgment did not dispose of either plea of the general issue, and did not in terms dispose of the rights of the parties. To make it a final judgment it should, according to the authorities, have contained a statement that "it is considered by the court that the plaintiff take nothing by her writ, and that the defendants go hence without day," or other words of similar import, disposing of the entire subject matter of the litigation. Freeman on Judgments, (2d ed.) sec. 16; Black on Judgments, sec. 31; *Scott v. Burton*, 6 Tex. 322; 11 Ency. of Pl. & Pr. p. 925; *Dusing v. Nelson*, 7 Col. 184.

It may be conceded that when the defendant's plea goes to bar the action, if the plaintiff demurs to it and the demurrer is determined in favor of the plea and plaintiff abides the

demurrer, final judgment should be entered in favor of the defendant even if one or more issues of fact raised by other pleadings stand undetermined in the cause. (*Ward v. Stout*, 32 Ill. 399.) The question here is not whether final judgment should have been entered against the plaintiff, but, was it so entered? We think, under the authority of *Zimmerman v. Zimmerman*, 15 Ill. 84, that a judgment which disposes of, or finds, all the issues in the cause in favor of the defendant and awards the costs against plaintiff, may be regarded as a final judgment even though not strictly in proper legal form; but here the two pleas of the general issue are not disposed of at all, and under such circumstances, we do not consider a judgment for costs against the plaintiff as a final determination of the cause.

It follows, therefore, that the judgment of the circuit court set out above is interlocutory, and that the cause must be regarded as still pending in that court.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

CHARLES WISTRAND

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Opinion filed December 22, 1904.

1. JURORS—*jurors in the criminal court of Cook county may be transferred from one branch to another.* Jurors summoned for any term of the criminal court of Cook county, if otherwise qualified, are eligible for service in any branch of that court in session during their term of service, and may be transferred from one branch to another, as suits convenience of the various branches of the court.

2. SAME—*overruling challenge to array must be prejudicial to reverse.* A judgment of conviction will not be reversed because the challenge to the array was overruled, unless it appears that some substantial right of the accused was thereby impaired.

3. *SAME—accused entitled to list of all jurors.* Previous to arraignment of the accused in a branch of the criminal court of Cook county he is entitled to a list of all the jurors, and not merely to a list of those assigned to the particular branch where he is to be tried; but it is not ground for complaint that no tickets bearing the names of jurors serving in other branches are placed in the box from which the particular jury which is to try his case is drawn.

4. *SAME—correct practice where the list of jurors in particular branch is exhausted.* Jurors assigned to the different branches of the criminal court of Cook county are regarded as in actual jury service so far as the other branches are concerned, but if the list of jurors in the particular branch where a case is to be tried is exhausted, the names of jurors from another branch may be placed in the box from which the jury is drawn.

5. *RAPE—what must be shown to prove rape without force.* To prove rape without force it must be shown that the female was under fourteen years of age, that the male was over sixteen years and that there was sexual intercourse between them.

6. *SAME—when age of accused cannot be proven by his confession.* In a prosecution for rape without force, the age of the accused, being a part of the *corpus delicti*, cannot be proven by a statement in his voluntary written confession that he was forty-four years old, there being no other proof on such point.

7. *SAME—jury cannot fix age by inspection of person.* The age of one accused of the crime of rape in having sexual intercourse, by consent, with a female under fourteen years of age, cannot be fixed from an inspection of his person by the jury, but may be proved by testimony as to his apparent age, which can be preserved for review in the record.

WRIT OF ERROR to the Criminal Court of Cook county;
the Hon. R. W. CLIFFORD, Judge, presiding.

This is a writ of error, sued out of this court by Charles Wistrand, the plaintiff in error, to review a judgment of the criminal court of Cook county whereby plaintiff in error was adjudged guilty of the crime of rape and sentenced to the penitentiary for a term of two years.

The indictment consisted of three counts. The first and third charged rape by force upon one Eva Goldstein. There was no evidence of the use of force to sustain these counts. The second count charged the commission of the crime with-

out force, alleging that the defendant was a male person above the age of sixteen years; that the female was under the age of fourteen years, and that the act was committed with the consent of the female.

The evidence for the prosecution showed that the plaintiff in error had sexual intercourse with one Eva Goldstein, a girl under the age of fourteen years, on or about June 17, 1904. The defendant below did not testify in his own behalf, except on a preliminary question considered by the court alone, and did not offer any evidence except that of his good reputation for chastity and for peace and quiet.

The jury which tried the case was composed in part of jurors obtained from among jurors serving in other branches of the criminal court of Cook county. Six hundred jurors had been summoned to attend this term of court and had been distributed among the six branches of the court and each one empaneled in the branch to which he had been assigned, each branch thus having different jurors. The list of jurors serving in that branch in which plaintiff in error was to be tried, having been exhausted by reason of the fact that some of the jurors whose names constituted such list had been selected in a preceding case and were engaged in the consideration of that case and by the fact that others had been transferred to other branches of the court, the sheriff, by order of court, obtained jurors from other branches of the court, and a list was thus made up from which to select a jury for the trial of the case. Plaintiff in error challenged the array, but the court overruled the challenge. He then challenged each juror called to the jury box for cause, assigning as the cause that the juror had been ordered, selected and summoned to that branch of the court without authority of law. He exhausted all his peremptory challenges. As the list of jurors thus obtained became exhausted, the sheriff obtained more jurors from the other branches of the court. Plaintiff in error challenged these as they were brought in, and refused to accept any of the jurors called. He was fur-

nished with a list of the jurors constituting the first list so obtained and was also furnished with lists of the other jurors as they were brought in by the sheriff.

The only evidence of the age of the prosecuting witness was that of her father, who testified that she would be fourteen years old on the 14th of September following. The only evidence of the age of the defendant was contained in a written confession, signed by the defendant, which was offered by the prosecution and admitted in evidence after proof that it was voluntarily made, in which he stated that he was forty-four years of age, and in which he also admitted having had sexual intercourse with the prosecuting witness at the time charged in the declaration and at times previous thereto.

The errors assigned are that the court erred in overruling the challenge to the array and in overruling the challenge for cause to each juror in the case; in refusing certain instructions and modifying others asked by the defendant below; in giving certain instructions asked by the State; in failing to submit a form of verdict finding defendant guilty of assault; in admitting the confession in evidence and in refusing to receive evidence of defendant's general reputation for peace and quiet. It is also urged that there is no legal evidence of the age of the plaintiff in error, and that the court permitted the State's attorney to ask leading questions of the witnesses for the prosecution.

CHARLES P. R. MACAULAY, and OSCAR D. OLSON, for plaintiff in error.

H. J. HAMLIN, Attorney General, CHARLES S. DENEEN, State's Attorney, and E. C. LINDLEY, for the People.

Mr. JUSTICE SCOTT delivered the opinion of the court:

It is provided by section 88a of chapter 37, Hurd's Revised Statutes of 1903, "that two or more of the judges of the criminal court of Cook county, may each hold a different

branch of said court at the same time." At the time of the trial of this cause, several branches of that court were in session. The jury commissioners had summoned six hundred jurors to appear at that term, and these jurors had been divided among the various branches of the court, each juror being directed to report for service in a particular branch. Plaintiff in error was tried in the branch over which Hon. Richard W. Clifford, one of the judges of the circuit court of Cook county was presiding. Upon the list of jurors, who had been assigned to duty in that branch, being exhausted, jurors were transferred from other branches to that branch of the criminal court. The legality of so transferring these jurors was questioned by a challenge to the array.

Section 29 of chapter 78, Hurd's Revised Statutes of 1903, which applies to Cook county, directs that "one or more of the judges of said court shall certify to the clerk of the court the number of jurors required at each term," and that jurors to that number shall be drawn from the jury box kept by the jury commissioners, and "if more jurors are needed during said term, the court shall so certify, and they shall be drawn and summoned as above provided forthwith."

Plaintiff in error's contention is that upon the list of the jurors who had been assigned to duty in the branch of the court presided over by Judge Clifford being exhausted, others should have been drawn and summoned in accordance with the directions contained in the language last above quoted, and urges that the entire jury drawn cannot be regarded as a jury drawn for but one court, for the reason that if that was the situation, then under section 12 of chapter 78, *supra*, it would be the duty of the court to discharge all the jurors in excess of twenty-four. Our view is that in Cook county, where the act authorizing the appointment of jury commissioners is in force, the fourth section of the last mentioned act, being section 29, *supra*, governs this matter, and that the number of jurors who should be in attendance upon a term of the criminal court is "the number of jurors re-

quired at each term," in the language of that section, and that section 12, *supra*, in so far as it directs the discharge of all jurors in excess of twenty-four who appear in response to the jury summons, does not apply in that county to a court having several branches. There is but one criminal court of Cook county. All the jurors properly drawn and summoned for any term, if otherwise qualified, are eligible for service in any branch of the court which may be in session during the term of service, and may be transferred from one branch of the court to another as suits the convenience of the various branches of that court.

Plaintiff in error seeks to sustain his challenge to the array by the case of *People v. Compton*, 132 Cal. 484. In that case it was held that if the jurors serving in different branches of the same court were, as we think they are, members of the same panel, tickets having the names of all the jurors serving in all the branches should be placed by the clerk of the court in the box from which he draws the jury for a particular case, and that a failure in this regard was fatal to the judgment. We have frequently held that the judgment of the court below will not be reversed because a challenge to the array was overruled, unless it appears that some substantial right of the defendant was thereby impaired. (*Wilhelm v. People*, 72 Ill. 468; *Siebert v. People*, 143 id. 571; *Healy v. People*, 177 id. 306.) Following this rule, long established in this State, we are brought to a conclusion diametrically opposed to that reached by the able court which pronounced judgment in *People v. Compton*, *supra*.

The purpose of the act authorizing the appointment of jury commissioners was to secure to litigants jurors drawn at random by the clerk of the court from names selected by the jury commissioners, who in turn were to be selected by the judges of the several courts of record of the county. The discretion and competency of the persons chosen as such commissioners were to be taken into consideration, the pur-

pose being to prevent abuses in the selection of juries and to insure, so far as possible, that none but competent, honest and impartial jurymen should be called into the box, and that the interest of neither party to the controversy should in any way intervene in determining what jurors should be drawn and summoned for any particular term of the court. Defendant has had the benefit of the safeguards of that act. No juror was called in his cause except one who had been selected and drawn in the office of the jury commissioners in the manner contemplated by that act. To adopt the view which he holds would be to require the drawing of a separate jury for each branch of the criminal court, and to do this would be to interpolate into the statute language not found there and would amount to judicial legislation.

It follows, however, that a defendant in the criminal court, previous to his arraignment, is entitled to a list of all the jurors, then selected to serve and who will be immediately engaged in service in that court, and not merely to a list of those who have already been assigned to a particular branch of the court. When he is furnished with such a list, the fact that some of the jurors on that list are then serving in other branches of the criminal court and that no tickets having the names of such jurors are placed in the box from which the clerk draws the particular jury for the trial of his case, is not a just cause of complaint. If he were tried in a court having no branches or divisions and where but twenty-four jurors were in attendance, if twelve of these were engaged in considering of their verdict in another cause at the time a jury was called to try his case, tickets bearing the names of the jurors serving in such other cause would not be placed in the box from which the clerk would draw the names for the jury about to be examined and sworn. In such case, the jury is not drawn by lot from among all the jurors, but those already actually engaged in performing jury service are necessarily excluded. In the criminal court, jurors serving in branches other than that in

which plaintiff in error was tried are members of the same panel as those serving in the latter branch, but may be regarded as already engaged in actual jury service, so that their names need not be put in the box from which the jury is drawn to try the defendant in the first instance, but may be so placed therein should the list of jurors serving in the branch where the cause is being heard be exhausted, precisely as in a court without divisions or branches a jury which is considering a case comes in with a verdict while a jury is being selected in another cause and the necessity for the services of those coming in with the verdict arising, their names are placed in the box to be drawn to complete the jury in the second case.

There is in this record no evidence that tends to show the commission of the crime of rape by force. Where a conviction of the crime of rape without force is sought, to establish the *corpus delicti*, it is necessary that the proof should show, first, that the female was under the age of fourteen; second, that the male was over the age of sixteen; third, that sexual intercourse occurred between them. In this case the fact that the female had not reached the age of fourteen was shown by the evidence of her father. The fact that the sexual intercourse took place was shown by the evidence of the female herself and by the written confession of the male, made shortly after his arrest. This confession contained also a statement that he was forty-four years old, and his age was not otherwise proven. It is elementary that the *corpus delicti* cannot be proven by the confession of the defendant alone. (*May v. People*, 92 Ill. 343; *Williams v. People*, 101 id. 382; *Gore v. People*, 162 id. 259.) Unless the defendant was above the age of sixteen at the time of the alleged commission of the offense, there was no violation of the statute. It was as essential to prove his age as it was to establish the age of the female, or to show that fornication occurred. Either of the three elements lacking, the *corpus delicti* is not established. Consequently, there should be evidence tending

to establish each of these three necessary facts aside from the confession of the defendant. So far as proving his age was concerned, there was no evidence except his confession. It follows, therefore, that without his confession there was no proof that a crime had been committed, because except he was more than sixteen years of age, no crime was committed. For the purpose of fixing the age of the defendant, persons who had seen him would have been competent to testify relative to his appearance, and such testimony would have been proper for the consideration of the jury on the question of age.

Defendant in error suggests that the defendant was present in court on the trial and that this together with the confession was sufficient to justify the jury in finding him to be more than sixteen years of age. The defendant did not take the witness stand except on a preliminary question in reference to the admission of his confession in evidence, and the jury was excluded from the court room while he was testifying on that subject. But whether he did or did not testify, the law does not allow the jury to fix his age by inspecting his person. (*Stephenson v. State*, 28 Ind. 272.) While the appearance of the defendant might be conclusive evidence to the jury, there would be some difficulty in having evidence of that character preserved in the bill of exceptions for the inspection of a court of review. "To allow a jury to make up their verdict upon a disputed fact from their own individual observation would be most dangerous and unjust." *Scav-erns v. Lischinski*, 181 Ill. 358.

There is no merit in the other errors assigned.

The judgment will be reversed and the cause will be remanded to the criminal court of Cook county.

Reversed and remanded.

JACOB GLOS *et al.*

v.

HARVEY H. TALCOTT *et al.**Opinion filed December 22, 1904.*

1. REGISTRATION OF TITLE—*admitting alleged abstracts of title without preliminary proof is error.* Admitting alleged abstracts of title in evidence, over the defendant's objection, without preliminary proof that the original deeds were lost or destroyed or beyond the power of the party to produce them, or that the abstracts were made in the ordinary course of business, is error.

2. SAME—*applicant not required to prove invalidity of tax deed.* It is not incumbent upon the applicant for registration of title to affirmatively establish the invalidity of tax deeds held by the parties made defendants to the proceeding.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.

On September 9, 1901, the defendant in error Harvey H. Talcott filed his application to register the title to a certain lot located in the city of Chicago, under the provisions of the "Act concerning land titles," alleging that he was the owner in fee and in possession by a tenant, and that the plaintiff in error Jacob Gos had some interest therein under two alleged tax deeds. Subsequently Emma J. Gos was made a defendant. The defendants, Jacob Gos and Emma J. Gos, filed answers admitting, as alleged, that they claimed title under two tax deeds, and neither admitting nor denying the other allegations contained in the application. The examiner found the title to said lot to be in the defendant in error Talcott in fee, returned the evidence with his report and recommended that the tax deeds held by Jacob Gos be set aside on the payment to him of \$26.84, and that the title to said premises be registered in fee simple in the name of Harvey H. Talcott. Objections and exceptions were overruled to the examiner's report and a decree was entered in accordance with his rec-

ommendations, and this writ of error has been sued out to review said decree.

JACOB GLOS, *pro se*, (JOHN R. O'CONNOR, of counsel.)

Mr. JUSTICE HAND delivered the opinion of the court:

The only evidence offered by the applicant in support of his claim of title was a master's deed of the premises in question to him, dated August 22, 1899, and proof that he was in possession of the premises by a tenant, and certain printed abstracts of title purporting to show abstracts of the record of a number of conveyances of said lot. Said abstracts of title were admitted in evidence by the examiner over the objection of plaintiffs in error, without preliminary proof that the original deeds which appeared in the alleged abstracts were lost or destroyed by fire or otherwise, or that it was not in the power of the defendants in error to produce them, or that the abstracts of title had been made in the ordinary course of business,—in other words, without requiring a compliance with the requirements of either section 23 or 24 of chapter 116 or of section 36 of chapter 30 of the Revised Statutes. The objections of the plaintiffs in error to the admission of said abstracts of title in evidence were properly preserved by the plaintiffs in error by objections and exceptions to the examiner's report, which were overruled. The admission of said abstracts of title in evidence without a proper foundation for their admission having been laid, under the authority of *Glos v. Hollowell*, 190 Ill. 65, and *Glos v. Cessna*, 207 id. 69, constituted reversible error.

The contention of plaintiffs in error that it was incumbent on the defendants in error to affirmatively establish the invalidity of plaintiffs in error's tax deeds is not well taken. *Glos v. Hoban*, 212 Ill. 222.

The decree of the circuit court of Cook county will be reversed and the cause remanded.

Reversed and remanded.

CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RY. CO.

v.

THE POLECAT DRAINAGE DISTRICT.

Opinion filed December 22, 1904.

1. EMINENT DOMAIN—*a public use may be local.* It is not essential to the public character of a use that the entire community or people of the State, or any political subdivision thereof, shall be benefited by such use.

2. SAME—*use must be controlled by law to make it public.* To be public the use must concern a community as distinguished from individuals, and must be controlled by law after the condemnation of property therefor.

3. SAME—*when drainage ditch is a public use.* The use of land for the construction of a ditch of a drainage district organized under the Drainage and Levee act of 1879 is a "public use" and the ditch is a "public work," within the meaning of section 2 of the Eminent Domain act.

4. DRAINAGE—*district organized under Levee act may acquire land by condemnation.* Since the method prescribed in the Levee act of 1879 for acquiring land for the construction of drainage ditches "across the lands of others" is unconstitutional, a district organized under such act may acquire land for such ditches by proceeding under the Eminent Domain act.

5. SAME—*legality of district's organization cannot be questioned in condemnation.* The *prima facie* legality of the organization of a drainage district under the Levee act of 1879 cannot be questioned in a proceeding by the district to condemn land for a ditch.

6. INSTRUCTIONS—*when instruction as to credibility of witness is erroneous.* An instruction in a condemnation case that the jury "are not bound to believe the testimony of any witness as to cost of railroad or other bridges, who testifies that he is not acquainted with the location of the proposed bridges and never saw the location of the bridges that are now there," etc., is erroneous and prejudicial, where but one witness testified on the subject of such bridges and his testimony is misrepresented in the instruction.

APPEAL from the County Court of Coles county; the Hon. T. N. COFER, Judge, presiding.

H. A. NEAL, R. G. HAMMOND, and F. K. DUNN, for appellant.

A. C. ANDERSON, and EDWARD C. CRAIG, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This was a petition filed by the appellee drainage district under the provisions of the Eminent Domain act, for the condemnation of the right of way for the ditch of the drainage district in the bed of a natural water-course, across the right of way of the appellant company at two points. The appellant filed a cross-petition, asking for an assessment in its favor for damages to property not taken. A hearing resulted in an order granting the relief prayed for in the petition, at petitioner's cost, on the payment to the appellant company of the sum of \$40 for the property taken and the sum of \$1000 damages to property not taken.

The appellee district was organized under the provisions of an act of the General Assembly adopted May 29, 1879, familiarly known as the Drainage and Levee act, which act constitutes paragraphs 1 to 74, inclusive, of chapter 42 of Hurd's Statutes of 1899. The contention of the appellant company that the said act provides a mode of procedure for the condemnation of the lands of others for use as a right of way of the drainage ditch, and that as the statute which gives the right of condemnation provides the remedy such remedy is exclusive and no other can be availed of, is not sound, for the reason that the remedy provided in the said act is in violation of constitutional guaranties of the citizen, as we held in *Wabash Railroad Co. v. Coon Run Drainage District*, 194 Ill. 310, and that being true, in legal effect the act provided no remedy whatever for the condemnation of the lands of others. Section 2 of said act of May 29, 1879, under which the appellee district claims corporate existence, authorized drainage districts formed thereunder to construct drains or ditches "across the lands of others." This enactment was adopted in pursuance of the provisions of section 31 of article 4 of the constitution of 1870, as amended November 28, 1878, (1 Starr & Cur. Stat. 1896, p. 138,) and

which authorized the General Assembly to pass laws to provide for the organization of drainage districts with power to construct drains, ditches and levees "across the lands of others."

The question first arising is, as the remedy for condemnation provided by the act has proven inoperative and void, may such districts avail themselves of the Eminent Domain act in order to procure the right to construct their ditches across the lands of others. The power of eminent domain can only be exercised when the property to be taken is to be devoted to a public use. A public use means public usefulness, utility, advantage or benefit. It is not essential that the entire community or people of the State, or any political subdivision thereof, should be benefited or share in the use or enjoyment thereof. The use may be local or limited. It may be confined to a particular district and still be public. (10 Am. & Eng. Ency. of Law,—2d ed.—1063.) If local or limited, the use must be directly beneficial to a considerable number of the inhabitants of a section of the State, and the property to be taken must be controlled by law, for the advantage of that particular portion of the community to be benefited. Private property cannot be condemned by a person or corporation on the ground the general prosperity of the State or community would be promoted thereby, if the title to the property so taken is to be vested in such person or corporation as private property, to be used and controlled as other private property. To be public the use must concern a community, as distinguished from an individual or any particular number of individuals, and then, to authorize the condemnation of private property, the law must control the use to be made of the property, after it has been condemned, to the end that it shall be devoted to the public purpose which alone could justify the taking of the same from the owner without his consent. Tested by these observations, and in view of the amendment to the constitution authorizing drainage districts to construct their drains across the lands of

others, the use of lands for the purpose of constructing thereon the ditch of a drainage district organized under the said statute is a "public use," and such ditch dug for that purpose is to be regarded as a "public work," within the meaning of those words as used in section 2 of the Eminent Domain act. Having the right, by virtue of the constitution and the laws made in pursuance thereof, to construct their ditches "across the lands of others," and the use to be made of such ditches being a public use, we entertain no doubt of the power of drainage districts to avail of the provisions of the Eminent Domain act to enable them to obtain the legal right to the right of way through and over the lands of others for their ditches.

The question whether the appellee drainage district had been legally organized did not and could not arise in the proceeding for the condemnation of a right of way for the ditch across the lands of the appellant company. A petition to the Coles county court for the entry of an order creating the district and a final decree or order of the said county court establishing the district were produced in evidence. The statute invested the county court of that county with jurisdiction to entertain petitions for the formation of drainage and levee districts and to enter final order establishing such districts. Jurisdiction and power were therefore vested in the county court to determine whether the petition bore the signatures of the requisite number of qualified petitioners and was in other respects in compliance with the statute. Whether it correctly exercised such power or jurisdiction could not be considered in this a collateral proceeding. The final order of the court having jurisdiction of the person and subject matter, cannot be inquired into and impeached in a collateral proceeding. (*Figge v. Rowlen*, 185 Ill. 234.) The legality of the organization of a drainage and levee district can be attacked and brought under judicial review only in a direct proceeding by *quo warranto*. (*Osborn v. People ex rel.* 103 Ill. 224.) The trial court therefore properly refused to con-

sider the issue sought to be introduced by the appellant company whether the petition for the formation of the drainage district contained the number of qualified petitioners required by section 2 of the act of 1879.

The petition asked the condemnation of two separate strips of land, each sixty-six feet in width and one hundred feet in length, across the right of way of the appellant company. Polecat creek ran through and crossed the right of way of the railroad and returning again crossed the right of way, and the railroad company had a bridge over the stream at each crossing. The drainage district proposed to widen and deepen the bed of the stream at each of the crossings, thereby making a ditch thirty feet in width at the top at both places. The appellant company claimed that this would necessitate the tearing away of all or a portion of each of the bridges and re-building the same, and by its cross-petition sought an assessment of the damages and expense thereby to be occasioned. In support of this claim the appellant company introduced as a witness Charles Fisk, assistant civil engineer of the appellant company, who testified that the damage which would thereby be occasioned at the more westerly bridge would range from \$2000 to \$3000 and from \$3200 to \$3500 at the more easterly crossing. On cross-examination the witness stated that he had examined the bridges several times when passing over the road on a train; that he never stopped and inspected the bridges, or either of them; that the east bridge was not an old wooden bridge; he admitted that it would not be necessary to tear out the bridges if the drainage district could and would lift the dredge-boats over them; that he had had no experience in dredge-boat work, but had never heard of lifting a dredge-boat and carrying it over a railroad track. There was no other proof relative to the damages that would be occasioned to the appellant company, or as to the expense which would be entailed upon it, by the construction of the ditch across the right of way and under its tracks and bridges. The jury

allowed \$1000 as damages to land not taken. Appellant contends that this finding is contrary to and wholly irreconcilable with the testimony of Mr. Fisk, the only witness who was examined on that branch of the case. The testimony of Mr. Fisk was merely by way of estimates not made upon any careful personal examination of the bridges, and in view of the fact that the jurors visited and inspected the bridges we would be loth to interfere with the verdict if the jury had been left free to exercise their own judgment as to the weight and value of the testimony of Mr. Fisk. Instruction No. 12, given to the jury at the request of the appellee district, improperly interfered with the province and duty of the jury to fairly and correctly consider and weigh the testimony of that witness. It read as follows:

12. "The court instructs the jury that they are not bound to believe the testimony of any witness as to cost of railroad or other bridges, who testifies that he is not acquainted with the location of the proposed bridges and never saw the location or the bridges that are now there, but should give the testimony such weight, if any, to which you may, from all the evidence in the case, believe such witness' testimony may be entitled."

As no other witness than Mr. Fisk testified on behalf of either party as to the cost of the bridges or the expense of rebuilding or partially re-building them, the instruction must, of necessity, have been intended and understood by the jury to apply only to his testimony. This witness did not, as the instruction told the jury, testify that "he was not acquainted with the location of the bridges and had never seen the location or the bridges," but, on the contrary, he testified he had examined them several times when passing over them on trains. He testified he was a civil engineer, had seen the bridges, denied that the more easterly bridge was an old wooden bridge, and gave his estimate of the expense that would attend the changes made necessary by enlarging the channel below the bridges. By the instruction the testimony

of the witness was incorrectly stated, and the erroneous statement declared sufficient to warrant the jury in refusing to believe his testimony. It was for the jury—not the court—to determine as to the credibility of the witness. True, the instruction, in the closing part thereof, told the jury that they should give to the testimony of the witness such weight, if any, which they might believe, from all the evidence in the case, his testimony was entitled to have; but the whole instruction considered together, carried it to the jury as the view of the court that the witness was not worthy of belief or his testimony entitled to any weight. The instruction was an unwarranted invasion of the province and duty of the jury to fairly consider and weigh the testimony of the witness. It was error to give it, and the effect certainly prejudiced the cause of the appellant company, possibly to the extent of depriving it of any benefit whatever from the testimony of the witness.

Counsel for the appellee insist the judgment should not be reversed for this error, for the reason the only damages claimed under the cross-petition were for the expense of enlarging, constructing, re-constructing, replacing or repairing the bridges, embankment and grade on the line of a natural water-course, and that the third proviso to section 55 of the Drainage and Levee act aforesaid, and section 56 of that act, require that the railroad company shall defray all such expense, and that therefore no award for damages whatever could have lawfully been made in favor of the railroad company, and hence that the appellant company had no legal right to recover because of anything testified to by the witness Fisk. Said amended section 55 provides, in effect, that when any ditch, drain or levee will benefit any public or corporate road or railroad, the commissioners shall apportion to the county, State or free turnpike road, to the township if a township road, to a company if a corporate road or railroad, "such portions of the cost and expenses thereof as to private individuals," and in case such apportionment is re-

sisted the matter shall be submitted to the jury. The first proviso to the section authorizes the drainage commissioners and "the corporate authorities of the county, State, or free turnpike, township road, corporate road, or railroad, or any of them," to stipulate as to the amount of such benefits. The second proviso is, "that the amount so assessed against any railroad company or private corporation shall" become a lien, and provides for the collection and for the payment of assessments against public corporations. The third proviso to the section is as follows: "*And provided further*, that the sum assessed against either of said corporations shall not include the expense of constructing, erecting or repairing any bridge, embankment or grade, culvert or other work of the roads of such corporations, crossing any ditch or drain, constructed on the line of any natural depression, channel or water-course; but the corporate authorities of such road or railroad, are hereby required, at their own expense, to construct such bridge, culvert, or other work, or to replace any bridge or culvert temporarily removed by the commissioners in doing the work of such district. Full power and authority is hereby given the drainage commissioners to remove such bridges or culverts for the purposes aforesaid, if they, in their judgment, find it necessary." (Hurd's Stat. 1899, p. 682.) Section 56 of the act makes it the duty of railroad companies, "when any ditch or drain or other work of enlarging any channel or water-course is located by the commissioners on the line of any natural depression or water-course, crossing the road of any railroad company where no bridge or culvert or opening of sufficient capacity to allow the natural flow of water of such ditch or water-course is constructed," on notice given by the commissioners, to construct such bridge or culvert according to the requirements of the commissioners.

Section 13 of article 2 of the constitution of 1870 declares that private property shall not be taken or damaged for public use without just compensation, and if the third

proviso to said section 55, and section 56, are in conflict with this constitutional guaranty, in that they purport or have operation to authorize the taking or damaging of the property of the appellant company without just compensation, they must, of course, be deemed inoperative and void.

The appellee drainage district filed the petition herein, averring that it possessed the legal right to construct its drains and ditches across the right of way of the appellant company and the lands of other property owners, defendants to the petition, on payment of just compensation; that it had been unable to agree as to the compensation to be paid to the appellant and the other property owners, defendants to the petition; that it desired to take, for the purposes of "widening, straightening, deepening and enlarging a ditch and water-course," two strips of land, each sixty-six feet in width, across the right of way of the appellant company, and prayed that the just compensation to be paid for the same should be assessed "in accordance with the law." The appellant company filed a cross-petition, in which it claimed damages to property not taken in addition to just compensation for that to be taken. A jury was empaneled and the evidence as to the value of the land to be taken and as to the damages to lands not taken,—that is, to the bridges and embankments,—was submitted, no question being raised relative to the duty of the railroad company, under said third proviso to section 55, and section 56, of said Drainage act, to enlarge the opening in its embankment and remove and enlarge its bridges, etc. Nor do we find anything in the proof to indicate that the drainage district claimed a right of way for its ditch as an easement of a waterway or without compensation, or that the notice required by section 56 had been given.

Neither the suggestion of counsel that under said proviso to section 55, and under said section 56, the appellant company can recover nothing, either as compensation for lands taken or as damages to lands not taken, nor the sup-

posed conflict between said proviso to section 55 and said section 56 and the constitutional guaranty hereinbefore mentioned, is presented by the pleadings in this record for our consideration.

On the record before us the judgment must be reversed, and the cause will be remanded for such other and further proceedings as to law and justice shall appertain.

Reversed and remanded.

CAROLINE O. JONES *et al.*

v.

THE CITY OF CHICAGO.

Opinion filed December 22, 1904.

1. SPECIAL ASSESSMENTS—*when estimate is made part of resolution.* Copying an estimate of cost, except the caption and the signature of the engineer, into the resolution for the improvement, which estimate is itemized to the satisfaction of the board of local improvements, is a sufficient compliance with section 7 of the Local Improvement act of 1897.

2. SAME—*what need not be set forth in first resolution for an improvement.* The first resolution of the board of local improvements for paving an alley, which describes the locality and character of the improvement, is not insufficient because it fails to give the width of the alley or to state how the improvement shall be paid for.

3. SAME—*what does not justify court in holding ordinance unreasonable.* The fact that witnesses may think an improvement is unnecessary does not justify a court in substituting its judgment for that of the municipal authorities in determining whether or not the ordinance providing for the improvement is reasonable.

4. SAME—*when description of broken stones for concrete is not indefinite.* The language of a paving ordinance in requiring the use in the concrete of "seven parts best quality of broken limestone, or other stone which shall be equal in quality for concrete purposes," is not substantially uncertain in using the words "or other stone."

APPEAL from the County Court of Cook county; the Hon. W. H. HINEBAUGH, Judge, presiding.

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CHARLES D. RICHARDS, and WILLIAM J. DONLIN, for appellants.

ROBERT REDFIELD, and FRANK JOHNSTON, Jr. (EDGAR BRONSON TOLMAN, Corporation Counsel, of counsel,) for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

The appellee, the city of Chicago, filed its petition in the county court of Cook county for the confirmation of a special assessment to pay the cost of curbing, grading and paving the alley between Clark street and LaSalle avenue from Chestnut street to Locust street. Legal objections were filed by the appellants questioning the preliminary proceedings and the validity and reasonableness of the ordinance. The ground upon which it was objected that the ordinance is unreasonable was that the improvement therein provided for was unnecessary, and in support of that contention evidence was introduced to the effect that witnesses thought the alley "in question in good, serviceable condition to carry heavy traffic." The judge who presided at the hearing, by agreement of the parties made a personal examination of the alley, and decided that the ordinance was not unreasonable and overruled the other objections. Further questions being waived by the objectors the assessment was confirmed. From that judgment this appeal is prosecuted.

The first ground of reversal insisted upon is, that the estimate of the cost of the improvement made by the engineer is not sufficiently itemized, and that it was not made a part of the resolution of the board of local improvements, as required by section 7 of the act of 1897. In support of this objection reliance is placed upon the cases of *Bickerdike v. City of Chicago*, 203 Ill. 636, and *Kilgallen v. City of Chicago*, 206 id. 557. Neither of these cases is in point. In the first it was simply held that the statute was not complied with by the resolution merely stating that the engineer had estimated the

cost in gross, and in the latter that the requirement of that section as to the engineer's estimate can only be complied with by incorporating such estimate in the record, and not by reference, only, to the estimate on file. In this case an estimate was made by the engineer and incorporated in the resolution of the board. That resolution is as follows:

"Be it resolved by the board of local improvements of the city of Chicago, That a local improvement be and the same is hereby ordered to be made within the city of Chicago, State of Illinois, as follows, to-wit: That the alley between North Clark street and LaSalle avenue from the north line of Chestnut street to the south line of Locust street be improved by curbing with wooden curb spiked to cedar posts, grading and paving of asphalt on six inches of Portland cement concrete, swept with natural hydraulic cement, the estimate of the cost of such improvement as made by the engineer of the board being as below set forth, and that Tuesday, the first day of March, A. D. 1904, at eleven o'clock A. M., in room 203 City Hall, be fixed for the time and place for the public consideration thereof.

Estimate.

Wood curb spiked to cedar posts, 800 lineal feet at twenty cents.....	\$160 00
Paving with asphalt on six inches of Portland cement concrete, swept with natural hydraulic cement, 765 square yards at \$2.50.....	1,912 50
Total.....	\$2,072 50

JOHN A. MAY, *Secretary.*"

The statute requires the estimate to be itemized to the satisfaction of the board, which shall be made a part of the record of the resolution. Here the estimate is copied literally into the resolution, except the caption and the signature of the engineer. Wherein it fails to substantially conform to the requirements of the statute we are at a loss to perceive.

The second ground of reversal urged is, that the width of the alley proposed to be paved is not shown either in the first resolution or in the estimate of the cost, and that there is no statement in that resolution, nor in the second resolution, that the proposed improvement shall be paid for by special assessment or special taxation. The statute requires that the first report of the board shall describe the proposed im-

provement, but it is not necessary that it should do so with minuteness. (*Walker v. City of Chicago*, 202 Ill. 531.) The resolution as above set forth does give the locality of the improvement and how it is to be made. We do not think it was essential, in the description of the improvement in that resolution, that the width of the alley should be stated. Nor is it necessary under said section 7, *supra*, that the first resolution should state how the improvement is to be paid for. That report leads up to the public hearing provided for in section 8, which provides: "And thereupon, if the said proposed improvement be not abandoned, the said board shall cause an ordinance to be prepared therefor, to be submitted to the council or board of trustees (as the case may be.) Such ordinance shall prescribe the nature, character, locality and description of such improvement, and shall provide whether the same shall be made wholly or in part by special assessment, or special taxation of contiguous property," etc. No objection is made to the ordinance in this case as not complying with the provisions of the statute. It expressly says that the improvement shall be made and the whole cost thereof paid for by special assessment, etc., and in describing the improvement it says: "The alley between North Clark street, * * * said alley being eighteen feet in width." This language, being unqualified, means the whole width of the alley,—eighteen feet.

The point that the ordinance is unreasonable is without force. "The presumptions are all in favor of the reasonableness of the ordinance, and we cannot declare it void unless it is manifestly so or is made so to appear from the evidence." (*Myers v. City of Chicago*, 196 Ill. 591.) The municipal authorities are the best judges of the necessity for the improvement of public streets and alleys. Merely because witnesses may think an improvement is unnecessary will not justify a court in substituting its judgment for that of the municipal authorities in determining whether or not an ordinance providing for an improvement is reasonable, and to

hold otherwise would be to put in issue the reasonableness of every ordinance for local improvement.

It is objected that the language of the ordinance, "that seven parts best quality of broken limestone, or *other stone* which shall be equal in quality for concrete purposes," is indefinite and uncertain. We do not regard the point as of substantial merit.

Our consideration of the grounds of reversal here urged has led to the conclusion that there is no substantial merit in either of them. The judgment of the county court will be affirmed.

Judgment affirmed.

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THE CITY OF CHICAGO

v.

O. S. RICHARDSON.

Opinion filed December 22, 1904.

1. SPECIAL ASSESSMENTS—*a supplemental assessment cannot be levied before improvement is completed.* Where a special assessment based upon the estimate of cost is levied and confirmed but the contract is let for a sum greater than the amount of the assessment, a supplemental assessment for the excess of the contract price over the original assessment cannot be levied before the improvement is completed.

2. SAME—*the deficiency cannot be determined until contract has been performed.* The deficiency for which a supplemental assessment may be levied under section 59 of the Local Improvement act of 1897 can only be determined after the contract has been performed. (*City of Chicago v. Noonan*, 210 Ill. 18, adhered to.)

APPEAL from the County Court of Cook county; the Hon. W. H. HINEBAUGH, Judge, presiding.

ROBERT REDFIELD, and FRANK JOHNSTON, Jr., (EDGAR B. TOLMAN, Corporation Counsel, of counsel,) for appellant.

CHARLES D. RICHARDS, and WILLIAM J. DONLIN, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The following question is the only one to be considered on this appeal: Where a special assessment based on the estimated cost of a proposed improvement is levied and confirmed and the contract is let for a sum greater than the assessment, can a supplemental assessment be levied for the excess of the contract price above the first assessment before the improvement is completed?

Appellant filed its petition in the county court of Cook county praying for an assessment to pay the estimated cost of a proposed street improvement. The assessment was levied and confirmed and the contract was then let for \$1967 more than the assessment. Thereupon appellant filed its petition in this case for a supplemental assessment, alleging that a deficiency had been created by the fact that the contract price was in excess of the original assessment. Appellee objected on the ground that the improvement had not been completed and the deficiency had not yet been actually and definitely ascertained. On the hearing it was stipulated that when the supplemental petition was filed only sixty per cent of the improvement had been completed and that it had not been completed at the time of the hearing. The court, being of the opinion that the law did not authorize the proceeding until the amount of the deficiency had been finally ascertained by the completion of the improvement, sustained the objection and dismissed the petition so far as it related to appellee's land.

The construction of section 59 of the Local Improvement act of 1897, which provides for a supplemental assessment in case of a deficiency, was involved in the case of *City of Chicago v. Noonan*, 210 Ill. 18, and in deciding that case we were of the opinion that the insufficiency of the first assessment contemplated by that section is to be determined after the contract has been performed, when the amount may be definitely known. We are satisfied that the decision

was correct. The law provides for the levy of an assessment before the work is actually done, in order that means of payment may be provided. Such an assessment must necessarily be based upon an estimate of the probable cost of the improvement, and while it is presumed that the estimate will equal the cost of the work, it may prove incorrect. Section 59 makes provision to meet the contingency of the assessment proving insufficient, in order that the work, when finally completed, may be paid for. If that should happen, the amount of the deficiency can only be finally and definitely ascertained after the work has been performed. If the contract is let for more than the amount of the assessment, all that can be said is, that if the contractor performs the obligation on his part he will become entitled to the contract price, which will exceed the amount of the assessment. If he does not perform his obligation another contract must be let for the unfinished portion of the work, and under changed conditions the second contract may be for more or less than the amount of the forfeited contract. There might be cases where interest or other things might affect the amount of the deficiency, and in no case can the actual deficiency in the first assessment be known until the work has been performed. The deficiency is not necessarily fixed by the difference between the contract price and the assessment, and if a supplemental assessment can be levied as soon as a contract is let, there could be another assessment on the re-letting of a forfeited contract or the happening of any other event which would increase the probable deficiency. We do not think it was the intention of the legislature that property owners may be called upon for successive assessments to meet probable but uncertain deficiencies.

The judgment of the county court is affirmed.

Judgment affirmed.

MARY HEALY

v.

THE PROTECTION MUTUAL FIRE INSURANCE COMPANY.

Opinion filed December 22, 1904.

1. **TENDER**—*tender after suit begun must be kept good.* After suit is begun to foreclose a trust deed or mortgage which provides for a reasonable solicitor's fee, a tender, in order to be effective, should include the amount of the solicitor's fee earned up to the time of the tender, and must be kept good.

2. **MORTGAGES**—*amount of solicitor's fee may be included in decree and draw interest.* After the court has fixed the amount of the reasonable solicitor's fee for foreclosing a mortgage, the same may be included in the decree and interest allowed on the total amount from the date of the decree.

3. **MASTERS IN CHANCERY**—*master cannot arbitrarily fix his fees.* A master in chancery cannot arbitrarily fix his fees for services in a lump sum without indicating in any way the character or extent of the services for which compensation is claimed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

This was a bill in chancery filed by the appellee in the circuit court of Cook county to foreclose a trust deed in the nature of a mortgage given to secure a series of promissory notes, upon which there remained due as principal the sum of \$5300. After the bill was filed the appellant called upon appellee to ascertain the amount then due upon said notes and trust deed, including interest and costs, and the appellee delivered to the appellant a statement showing the sum of \$5696.27 to then be due thereon, which included a solicitor's fee of \$150. The appellant thereupon tendered to the appellee the sum of \$5596.27, or the amount then claimed to be due by appellee upon said notes and trust deed, together with court costs, the expense of the continuation of the abstract of

title and a solicitor's fee of \$50, which amount the appellee declined to accept in satisfaction of said notes and trust deed. An answer and replication were then filed, and the case was referred to a master to take the proofs and report his conclusion. The master found the amount due upon the trust deed and notes, which included a solicitor's fee of \$250, to be \$5976.21, recommended that a decree be entered for that amount and that his fees as master be taxed at \$125.20, and a decree having been entered in accordance with the recommendations of the master, an appeal was perfected to the Appellate Court for the First District by the defendant, where the decree was affirmed, and a further appeal has been prosecuted by her to this court.

VOCKE & HEALY, for appellant.

DANIEL F. FLANNERY, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

It is first contended by appellant that she is not liable for solicitor's fees under the provisions of said trust deed. The provisions of this trust deed with reference to solicitor's fees are, in substance, the same as the provisions of the trust deeds construed in *Cheltenham Improvement Co. v. Whitehead*, 128 Ill. 279, and *Fuller v. Brown*, 167 id. 293. It was held in each of those cases a solicitor's fee was properly included in the decree of foreclosure, and the rule there announced is conclusive of the right of the appellee to recover a reasonable solicitor's fee in this case.

It is next contended that the appellant having tendered the appellee \$50 for its reasonable solicitor's fees, it was error to allow to appellee the amount recommended as a solicitor's fee by the master. The appellee suggests two reasons why this contention should not be sustained: First, that its solicitor had earned more than the amount tendered at the time the tender was made; and second, that the tender was

not kept good. As we are of the opinion the tender was not kept good, it will not be necessary to consider appellee's first proposition.

The tender was made on behalf of appellant by her husband, with his own funds. He afterwards placed them to his account in bank, and thereafter, by checking against the said amount, reduced it far below the amount of the tender. The rule in this State is, that when a tender is made after suit has been commenced to foreclose a trust deed or mortgage which provides for the payment of a reasonable solicitor's fee, to be effective the tender should include the amount of the solicitor's fee earned up to the time of the making of the tender, (*Fuller v. Brown, supra*), and that the tender must be kept good. *Crain v. McGoon*, 86 Ill. 431; *Aulger v. Clay*, 109 id. 487.

It is further urged that a solicitor's fee of \$250 is an unreasonable amount for the services performed in this case. Eleven practicing attorneys residing in the city of Chicago testified that the amount allowed as solicitor's fees by the court was a reasonable sum for the services performed by the solicitor of the appellee in this case. Their testimony was uncontradicted. The testimony of the attorneys called by the appellant having been confined to the value of the appellee's solicitor's service up to the time of making said tender, in view of the testimony and the fact that the chancellor is presumed to have taken into consideration, in fixing a reasonable solicitor's fee, his own knowledge as to what the services performed by the solicitor were reasonably worth, we do not feel justified in disturbing the amount fixed in this case. We are impressed, however, with the conviction the fee allowed was a large one for the services performed. In *Goodwillie v. Millmann*, 56 Ill. 523, on page 528 Mr. Justice WALKER, in commenting upon the duty of the trial judge in fixing the fees of solicitors in foreclosure and similar cases, said: "In taxing such fees the chancellor should exercise his own judgment, and not be wholly governed by the opinion of attor-

neys as to the value of the services. He has the requisite skill and knowledge to form some idea as to what is a fair and reasonable compensation, and he should exercise that judgment. He should, no doubt, consider the opinions of witnesses and evidence of the sum usually charged and paid for such services, but should not be wholly controlled by the opinions of attorneys as to their value."

It is next urged that it was error to include the amount of the solicitor's fees in the decree and to then provide that the entire amount of the decree draw interest from the date of the decree. We see nothing wrong in this. The trust deed provided for the allowance of reasonable solicitor's fees. When the fee was fixed by the court and included in the decree it became merged in the decree with the balance of the debt, and the decree properly provided the amount found due the appellee should draw interest from its date.

It is finally urged as ground for reversal that the court erred in allowing a master's fee of \$125.20. In *Schnadt v. Davis*, 185 Ill. 476, on page 487, the proper method in which masters in chancery should present to the court the amount of fees and charges asked to be allowed in their favor was pointed out. It was there said: "The report in this case as to the fees and charges of the master is as follows: 'Master's fee this report, \$50.' This mode of reporting fees and charges can be easily made a cover for illegal and oppressive exactions. An itemized statement of services rendered, and the fees allowed therefor by the statute, should be made, and if services are rendered for which the fees are not fixed by the statute but are left to be determined by the chancellor, the report should state such service and the action of the court in the matter of the master's compensation therefor, and also should show whether such costs had been paid, and if paid, by whom." The master in this case, in total disregard of the practice as there announced, endorsed upon his report, "Master's fee, \$125.20," and the decree taxed that amount against appellant as costs. From the statement endorsed upon the

master's report we are unable to determine what services the master sought to have the court allow him compensation for. The solicitor of appellee, in defense of said charge, points out that the master charged \$50 for writing up the testimony, and spent sixteen hours, at \$5 per hour, in reaching a conclusion in the case, and for which he says, under the practice in vogue in Cook county, the master was entitled to \$80, but that he had only charged therefor \$75.20. The question submitted to the master involved the allowance of a solicitor's fee in a foreclosure case, which he finally fixed at \$250. The appellant had offered to pay a solicitor's fee of \$50, so that the matter in controversy was really only \$200,—an amount within the jurisdiction of a justice of the peace. The statute does not contemplate that a master in chancery in counties of the third class shall for such a service arbitrarily fix the amount of \$75.20, or any other amount, as his fees, and then hotch-potch it with other charges, so that the litigant who is called upon to pay it, or a court of review that is called upon to review the action of the lower court in allowing such charge, cannot tell for what service the litigant is asked to pay. In the *Schnadt-Davis case*, *supra*, it was said (p. 487): "The master cannot arbitrarily fix upon an amount to be paid him as his compensation for examining questions of fact and reporting his conclusions, but before he is entitled to demand the parties, or either of them, shall compensate him in any sum for such services, it is his duty to have the court determine the amount he is justly entitled to receive for such services." The report of the master was not proper in form and his charges were excessive.

The judgment of the Appellate Court and the decree of the circuit court will be reversed and the case remanded to the circuit court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

FLORENCE BUTMAN, Admx.

v.

THOMAS H. BUTMAN *et al.*

Opinion filed December 22, 1904.

1. JURISDICTION—*filing a demurrer gives jurisdiction of person.* Filing a demurrer to a bill, the appearance of the parties demurring being unlimited, gives jurisdiction of the person as complete as though there had been personal service.

2. PARTIES—*what is not a misjoinder of parties.* Naming the widow in her individual capacity and in her capacity as administratrix as parties complainant in a bill against heirs to compel specific performance of contract to convey land is not misjoinder of parties.

3. EQUITY—*when bill for specific performance is a proper remedy.* If the personal representative of a deceased person is unable to carry out her intestate's contract for the sale of land because of the refusal of the heirs to join in the conveyance to the proposed vendee, who is ready and willing to complete the contract, the personal representative may maintain a bill in equity against the heirs to compel specific performance.

4. EXECUTORS AND ADMINISTRATORS—*section 4 of act relating to contracts construed.* Section 4 of the act relating to contracts, authorizing the personal representative of one who has contracted, in his lifetime, for the sale of land, to obtain an order of court for the execution of the necessary deed when the consideration has been paid, upon notice to the party to whom the deed is to be made, does not require notice to the heirs of the deceased vendor.

5. PLEADING—*when defense of the Statute of Frauds cannot be raised by demurrer.* Failure of a bill for specific performance of a contract for the sale of land to allege that the authority of the agent who made the sale was in writing is not ground for demurrer, where the bill alleges that the sale was made by the agent and ratified by the principal, in writing, in his lifetime.

6. CONTRACTS—*not essential to validity of a contract that seller know name of purchaser.* A contract for the sale of land, made by an agent within the terms of his written authority and ratified by the principal with full knowledge of the terms of the sale, is not invalid because the name of the proposed purchaser was not disclosed.

7. SPECIFIC PERFORMANCE—*what is not ground for demurrer to bill.* A bill by an administratrix against the heirs to compel them to join in a conveyance in pursuance of a contract of sale made by the intestate in his lifetime, is not demurrable because it fails to allege the sale is necessary for the payment of debts of the estate.

8. SAME—*courts cannot consider policy of a valid law.* In the exercise of its discretion in the matter of specific performance the court may consider the effect upon the parties interested in the property under the law, the result to the property and the equities of the parties as controlled by the law, but cannot consider the question of the wisdom or policy of the law itself.

APPEAL from the Circuit Court of Macon county; the Hon. W. C. JOHNS, Judge, presiding.

Appellant, Florence Butman, as administratrix of the estate of Jonathan W. Butman, deceased, and in her own right, as widow and heir-at-law of said Butman, filed a bill in chancery to the January term, 1904, of the circuit court of Macon county, for the purpose of compelling the specific performance of a contract to convey certain real estate. The bill alleges that Butman, in his lifetime, owned a certain residence property in Decatur, with a frontage of sixty-five feet on West William street; that during his lifetime he made a contract with one John N. Hill to sell the said property for \$6000, but that before the contract could be consummated by making a deed Butman departed this life on October 12, 1903. It is also alleged that Butman died intestate, leaving no child or children or descendants of a child or children him surviving, but left Florence Butman, his widow, and Florence Butman and the appellees, Thomas H. Butman, Albert A. Kendall, Estella J. Vant, Millicent L. Barker, Amey Warner, Henry W. Jameson and William Jameson as his sole and only heirs-at-law. The bill further alleges that John N. Hill, the vendee, is willing that the contract shall be performed and to accept a deed for the property if he can obtain a deed from all the heirs or through a decree of court, but the heirs aforesaid refuse to make a deed for the property unless the proceeds are treated as real estate. The bill alleges that the proceeds of the sale and the right to enforce the contract are choses in action, to be collected by the administratrix and to be accounted for in due course of administration.

The alleged contract is set out in the bill, and consists of numerous checks, telegrams, letters and memoranda. The bill alleges that Butman authorized his agents, Jesse LeForgee & Co., to sell the property for \$6000; that they procured a purchaser for the property in the person of John N. Hill, who agreed to pay \$6000 cash upon delivery of a deed. As an evidence of said contract and to make the same binding, John N. Hill, on September 22, 1903, gave his check to Jesse LeForgee & Co., payable to the order of Butman, for \$100, and the check recites on its face, "On purchase of his property through the agency of Jesse LeForgee & Co." Jesse LeForgee & Co. accepted the check on behalf of Butman as a binding payment upon the purchase price of the property. On the same day LeForgee & Co. telegraphed to Butman, who was then in Cleveland, Ohio: "Have sold your property for \$6000; answer if all right." On the next day, not having received a reply, they sent a second telegram: "Telegraphed you yesterday your property is sold for \$6000; did you get it? Answer." Butman telegraphed a reply to his agents: "Your telegram received this morning; all right; letter coming to-day." At the same time Butman wrote his agents confirming the telegrams, saying: "It is all right. * * * Glad you have found a customer. Try and bind the bargain so there will be no backing out. * * * Is it a cash or part time and part cash?" On receipt of this letter LeForgee & Co. wrote Butman, saying: "We have taken a cash payment on the sale of your property that fully binds the party. * * * In regard to the price, it is \$6000 cash on the delivery of the deed, you to furnish an abstract of title down to date showing a good title." On the same day, before receiving this last letter, Butman again wrote LeForgee & Co.: "I told you the sale was all right, and told you to make arrangements with Mr. Hill about leaving the house. I told him I would give him thirty days, and more if the one that bought it could arrange with him to let him for any longer time." Hill had been occupying the house as a

tenant. On September 25, 1903, Butman received the letter from LeForgee & Co. in regard to the terms of sale, and again wrote LeForgee & Co., saying he expected to come home the last of the following week, and "it will be all right when I get there."

The bill further alleges that in pursuance of the contract Hill, on October 8, 1903, before Butman's return, deposited a check in escrow with the Millikin National Bank, to the order of Butman, for \$6000, to be delivered upon the execution of a deed and the surrender of the \$100 check, and that LeForgee & Co. were notified of the deposit of the check. It is also alleged that the property mentioned in the letters, telegrams and checks as "your property," "his property" and "the Hill property" was the property which is specifically described in the bill, which had been occupied by Hill as a tenant but whose lease expired October 1, 1903. It is also alleged that after October 1, 1903, Hill remained in possession claiming under his contract, and that he had more than sufficient money in the bank to pay the check. It is further alleged that Hill was shown all of the letters and the telegrams received by LeForgee & Co. from Butman, and knew that Butman had therein and thereby ratified and confirmed the sale made by the agents to him. The bill alleges that by reason of the letters, telegrams and checks a contract was created, binding upon Hill and Butman, and that upon Butman's return to Decatur upon October 9, 1903, he was informed that Hill was the purchaser, but that before the papers could be prepared to consummate the sale Butman departed this life.

A general and special demurrer was filed by the heirs to the bill and the same was sustained by the court. An amended bill was also filed, to which a demurrer was also sustained. Appellant filed a second amended bill, and her suit was dismissed for want of equity. Appellant prayed an appeal from the order sustaining the demurrer to the second amended bill and dismissing the amended bill for want of equity, to the

Supreme Court, and has assigned the following errors: (1) The court erred in sustaining the demurrer to the second amended bill of complaint; (2) the court erred in dismissing the said amended bill of complaint for want of equity; (3) the court erred in entering a decree for costs against the complainant.

HUGH CREA, and HUGH W. HOUSUM, for appellant.

E. S. McDONALD, for appellees.

MR. CHIEF JUSTICE RICKS delivered the opinion of the court:

As this bill was dismissed upon demurrer and the assignments of error relate only to the action of the court in sustaining the same, our consideration will be directed to the grounds of the demurrer.

Ten special grounds were urged. In the first the point is made that as the service was by publication and the proceeding one *in personam* and not *in rem*, the court did not have jurisdiction of the persons of the defendants. To this ground it is sufficient to say that all of the defendants, except those personally served and defaulted or personally answering, interposed demurrers to the original, amended and second amended bills, and their appearance in court was unlimited and the jurisdiction as complete as though there had been personal service. *Protection Life Ins. Co. v. Palmer*, 81 Ill. 88.

In the second ground of demurrer it is urged that there is misjoinder of complainants, in that Florence Butman as administratrix and Florence Butman in her own right as widow and heir-at-law of Jonathan W. Butman are joined. It would be novel to find authorities sustaining the proposition that Florence Butman, as administratrix, could sue herself as widow and heir for the enforcement of the contract of the decedent. It is sufficient that the heirs may be made parties so that they may be heard and their rights adjusted, and

it is immaterial whether they join with the personal representative as complainants or are made defendants. *Duncan v. Wickliffe*, 4 Scam. 452; *Burger v. Potter*, 32 Ill. 66.

It is next urged that the appellant had a remedy at law to recover upon the contract. This could not be so. The purchaser did not refuse to perform, but, according to the bill, is now and at all times has been ready and willing and able to perform, while appellant, as personal representative of the decedent, is unable to perform, and has been since the death of the decedent, because of the refusal of the heirs to join in the conveyance. The decedent was to furnish an abstract showing title and make a deed, and the purchaser was to pay when that was done. Before the decedent returned home and before the deed was required to be made the purchaser placed a check for the money in escrow, where it has since remained. We have no doubt that this is the proper form of procedure. *Hulshizer v. Lamoreaux*, 58 Ill. 72.

As to the next ground, appellees cite and rely upon section 4 of chapter 29 of Hurd's Statutes, which provides: "The executor, administrator or heirs of any deceased person who shall have made such contract, bond or memorandum in writing, in his lifetime, for the conveyance of land, for a valuable consideration, * * * when such consideration has been paid and fulfilled as aforesaid, or a conveyance ought to be made, may, upon application in writing, obtain such order upon giving notice to the party to whom such deed is intended to be made, and under the same condition as is provided in this chapter." Under this objection it is contended that sufficient is not shown by the bill to bring the case within the requirements of this statute, and it is said, among other things, that no notice was served upon the appellees and that payment has not been made. The statute does not require service upon appellees, who represent the vendor, but the requirement is that the notice shall be to the vendee. The allegations of the bill are, that the vendee is ready and willing to perform and that the appellees refuse to

join in the conveyance, and they are in court, were served by publication and voluntarily subjected themselves to the jurisdiction of the court. No authority is offered in support of the contention other than the construction of the statute placed upon it by counsel for appellees, and we are unable to adopt the view of the statute urged by him.

The fifth ground of demurrer is, that the bill fails to disclose a valid agency existing between the vendor and Jesse LeForgee & Co., the agents who sold the property. The bill alleges that the decedent listed the land with the agents for sale; that they did make a sale, notified their principal thereof and of the terms of the sale, and that he, in various written telegrams and letters signed by him, confirmed and ratified the same. Under such circumstances it would seem immaterial whether the agent originally had written authority to sell or not. (*Fowler v. Fowler*, 204 Ill. 82.) It may be further remarked that the bill is silent as to whether the original authority was written or verbal. The allegation is, that "during his lifetime, and shortly prior to his death, the said Jonathan W. Butman listed his real estate with John E. Patterson and Jesse LeForgee & Co., doing business under the firm name and style of Jesse LeForgee & Co., as real estate agents in the city of Decatur, and suggested that they procure a purchaser for said real estate." There are also the further allegations, in substance, that the agents did procure a purchaser and did sell, and these allegations are admitted by the demurrer. The case of *Fowler v. Fowler*, *supra*, was very similar to the case at bar, and it was there contended that the dismissal of the bill was proper because the bill did not show, upon its face, whether the agent was authorized, in writing, to act, and it was there said (p. 103): "But it will not be presumed that his authority was a mere verbal one and within the Statute of Frauds because the bill does not allege that his authority was in writing. 'The benefit of the Statute of Frauds as a defense can be taken by demurrer only when it affirmatively appears from the bill that the

agreement relied upon is not evidenced by a writing duly signed.' (*Hamilton v. Downer*, 152 Ill. 651.) Inasmuch as it does not affirmatively appear from the bill in this case that the authority of Underwood is not evidenced by a writing duly signed, the Statute of Frauds cannot be used as a defense by demurrer." As we have said, we do not think it material whether the agent's authority was in writing or not, as the principal, with full knowledge of the sale and the terms and conditions thereof, ratified the same in writing, and it is as binding as though he had given written authority, in the first instance, to make the sale.

The sixth and seventh grounds relied on by appellees are, that the letters, telegrams and various written documents set out in the bill did not constitute a contract of sale for the lands described in the bill. Supporting this contention, the appellees point out that Butman, the vendor, so far as disclosed by the writings, had no communication with Hill, the vendee, and had no knowledge that he had become the purchaser. We do not think this fact, if it is a fact, is controlling. If it should be assumed that the agents had written authority to make the sale it would be immaterial whether the vendor of the property knew the name of the purchaser or not. If the sale was made by his authority to any person he would be bound to perform. The bill clearly disclosed that a sale was made and that he was apprised of it in all its details, save the name of the purchaser, and without inquiring as to the identity of the purchaser he ratified the acts of his agents in such manner as can leave no doubt in the mind of the court that, so far as the vendor was concerned, the name of the purchaser was to him a matter of indifference. The price, the terms of sale and the time of performance were the matters upon which he dwelt, and not the identity of the purchaser. The object uppermost in his mind seemed to be that the purchaser, whoever he might be, would be so bound and in such condition as he could and would pay the purchase money, as in his first letter he says: "Glad you have

found a customer; try and bind the bargain so there will be no backing out." The bill alleges that before Mr. Butman returned to Decatur, by arrangements with his agents, the purchaser placed in the Millikin Bank, in escrow, his check for the full amount of the purchase money. This cannot be looked upon in any other light than the performance, by his agents, of his direction to bind the bargain so there would be no backing out. He also, in the same letter, directed his agents to arrange with Mr. Hill, the occupant of the premises, for vacating them, as he had agreed to give him thirty days' notice of any sale. Taking the letters of Mr. Butman and giving them their ordinary interpretation we can come to no other conclusion than that the agents were carrying out and acting within the written authority conferred upon them by the letters. The agents had unmistakable authority to make the sale upon the terms stated, and they knew the purchaser, and what they knew, within their authority, was sufficient to bind their principal.

It is further said that in some of his letters decedent expressed doubt as to the time he would come home, and that from that fact the inference must be drawn that he did not regard the transactions as a sale, but only looked upon them as negotiations for a sale. We do not regard this construction as warranted by the letters, but look upon them as the prudent remarks of one absent from home, whose presence was necessary for the transaction of important business and yet the exact time of whose return was uncertain, but was not to be beyond a week or so.

By the eighth, ninth and tenth grounds of demurrer it is urged that the bill does not disclose that the sale was necessary for the payment of debts of the estate; that it does disclose that the appellant is seeking to convert real estate into personal property, so that she may, under the rule of descent, derive a greater portion thereof than she would if it should remain real estate, and that as between the parties the equities require that the property should remain and be treated

as real estate. No authority is cited, and none can be, as we believe, sustaining the proposition that a bill for specific performance of this contract could not or should not be allowed unless the funds arising therefrom are necessary for the payment of the debts of the decedent. Whether the property be regarded as real or personal, appellant was materially and directly interested therein in her individual capacity. If treated as real estate she is the owner of half of it in fee, and if personal property, the whole of it, subject, of course, in both cases, to the payment of the debts of the decedent. The owner of property may, by deed, will or other conveyance, dispose of it as to him seems best, but if he die without making any disposition of it it takes the course directed by the Statute of Descent. As to the policy of the statute that gives to the widow of an intestate who leaves no child or children, or descendants thereof, half of his real estate and all of his personal property, that matter is referable to the legislative authority and not to the courts. We are not authorized to withhold or grant relief upon the ground that we disapprove of or approve the policy of the legislative act. While it is true that many authorities may be found in which it is declared that the courts are vested with a large discretion in the consideration of bills for specific performance, it has been nowhere intimated that their notions of the policy of a valid law shall be in any part the basis upon which such discretion is predicated. The court may take into consideration the effect upon the parties who are interested in the property, under the law, and the result to the property itself, and the equities of the parties as controlled by the law, in the exercise of its discretion. By this demurrer it is in no way pointed out to the court that it will be disadvantageous to the property interests or to the individual interests of those having a legal claim upon this property if the prayer of the bill is granted. It is not shown that the consideration is not fair, that the estate will suffer any prejudice or wrong, or that the creditors who may have claims against the estate will be

prejudiced by it. What may be developed upon a trial we are not called upon to anticipate. It is sufficient that we regard the bill as stating a case to entitle the appellant to the relief prayed.

It was error to sustain the demurrer, and the decree dismissing the bill will be reversed and the cause remanded for such further proceedings as to law and justice shall appertain.

Reversed and remanded.

EMANUEL ZUCKERMAN

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Opinion filed December 22, 1904.

1. EVIDENCE—*when confession is properly allowed to go to the jury.* On a trial for embezzlement, a written confession of a previous embezzlement under the same contract may be admitted in evidence if the only proof then before the court is that the confession was voluntary; and if the defendant subsequently testifies that the confession was not voluntary, but makes no motion to exclude it, the jury may consider it under an instruction requiring them to consider all the evidence in respect to it.

2. EMBEZZLEMENT—*what is not included in the presumption of innocence.* The legal presumption of the innocence of an employee charged with embezzlement does not mean that although he collected money for his employer and kept it without accounting for it, he is to be presumed innocent of the intent implied by his act or to have no intent to defraud his employer.

3. INSTRUCTIONS—*when an instruction as to proof of guilt is erroneous.* An instruction in a criminal case is properly refused which requires the jury to find the accused not guilty unless the evidence "generates a full belief of his guilt," since entire certainty is not required.

4. SAME—*when failure of jury to return instruction will not reverse.* Failure of the jury to return into court an additional instruction given after their retirement is not ground for reversal, where the instruction, re-written by the judge from memory and inserted in the bill of exceptions, states a correct proposition of law and is not alleged to be different from the one not returned.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

JOHN E. KEHOE, and E. F. BOGART, for plaintiff in error.

H. J. HAMLIN, Attorney General, and CHARLES S. DE-NEEN, State's Attorney, (GEORGE B. GILLESPIE, FRANK CROWE, and J. G. GROSSBERG, of counsel,) for the People.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The plaintiff in error was employed by the Grossfeld & Roe Company, a corporation engaged in selling groceries at wholesale in Chicago, as an outside salesman, taking orders and collecting money from customers. He made collections from various customers which he did not account for or turn over to his employer, and on March 14, 1903, he furnished to the officers of the corporation a list of such customers and the amounts collected from them, aggregating \$1689.60, and signed two written statements confessing that he had collected said sums from customers of the corporation without accounting for them or paying the same over after demand and without the knowledge of the corporation. He was continued in the employ of the corporation afterward and collected from customers and retained other sums up to June 17, 1903, when he told the officers of the corporation that he had collected money amounting to about \$300 which he had not turned over. He was then arrested and was subsequently indicted for larceny and embezzlement. On his trial under the indictment he admitted the collection of \$316.09, specified in sundry receipts, which he had not paid to his employer. The only controversy as to matter of fact was whether he was authorized by his contract of employment to retain the sums of money collected and not turned over. The jury found him guilty of larceny by embezzlement and found the amount taken to be \$285.09. Motion for new trial was overruled and he was sentenced in accordance with the verdict.

The first alleged error is the admission in evidence of the papers executed by the defendant on March 14, 1903, confessing the embezzlement previous to that date. They were objected to when offered and the objection was overruled, but the only evidence then before the court was that the confession was purely voluntary. The question whether the confession was admissible in evidence was a preliminary one for the court, and for the purpose of determining that question it would have been proper for the court to hear the evidence on both sides as to the circumstances under which it was made. (*Bartley v. People*, 156 Ill. 234; 12 Cyc. 482; 1 Greenleaf on Evidence, sec. 219; 6 Am. & Eng. Ency. of Law,—2d ed.—554.) The defendant had offered no evidence on that question, and there was nothing before the court tending to prove any threat or improper influence or any promise or inducement tending to bring about the confession. The defendant afterward testified to facts tending to prove that the confession was not voluntary, but there was no motion to exclude it after such testimony was given. There was no ruling by the court as to its admissibility in view of the testimony given by the defendant as to the manner in which it was obtained. The jury were fairly instructed at the request of the defendant as to the consideration and credit to be given to the confession, and were directed to consider all the evidence respecting it, including its character and the manner in which it was obtained. The confession was properly submitted to the jury under that instruction.

It is next alleged that the court erred in giving the twelfth instruction at the request of the People, and it is said that it assumed as a fact that the terms of defendant's contract of employment were arbitrarily fixed and settled. The instruction did not assume the existence of any fact, but merely stated to the jury the law applicable to a case where, by the terms of his employment, an agent is required to pay over his collections to his principal and to wait for his commission until the profits have been ascertained, when the commission

is to be paid to the agent by the principal. The evidence on the part of the prosecution tended to prove that such were the terms of defendant's employment, and it was not error to give an instruction based on that theory. The instruction did not assume the truth of the theory.

It is next insisted that the court erred in refusing to give to the jury an instruction concerning the weight to be given to the confession. The jury were sufficiently instructed on that subject by the instruction already alluded to, and the refused instruction was of the nature of an argument to the jury by the court. It was properly refused.

Another instruction which was refused stated, in substance, that the legal presumption of innocence meant that the defendant did not intend to defraud his employer when he kept its money. There is no rule of law that an employee who takes his employer's money and keeps it without accounting for it is to be presumed innocent of the intent implied by his act or to have no intent to defraud his employer. The court was right in refusing to give such an instruction.

Another instruction which was refused related to the difference between civil and criminal cases. It was objectionable, both as being argumentative and because it required the jury to find the defendant not guilty unless the evidence generated a full belief of his guilt which was equivalent to entire certainty. In fact, a rule that the guilt of the defendant should be entirely certain was improperly given in another instruction. The instructions as a whole were more favorable to the defendant than the law.

After the jury had retired to consider their verdict they requested a further instruction and were brought into court, when an instruction was given in the presence of counsel. This instruction was not returned into court with the verdict. By the Practice act instructions taken by the jury are to be returned by them into court, but the failure to return the instruction in question was apparently overlooked, and no objection was made when the verdict was delivered or before

the jury were discharged. If the defendant knew that it was not returned and no objection was made, failure to return it should be considered as waived. However that may be, the judge re-wrote the instruction from memory and inserted it in the bill of exceptions, and it is not alleged that the instruction so appearing is not exactly as given to the jury. The instruction was correct as a matter of law, and it is apparent that the defendant was not prejudiced by a failure to return the instruction read to the jury. Under the circumstances the failure to return it is not ground for reversal.

It is also argued that the evidence was insufficient to justify the verdict. The defendant had drawn his weekly wages as agreed and had retained other money collected by him without any settlement or accounting with his employer, and the question of his guilt hinged on his right, under the contract, to retain the same. Taking the evidence in its most favorable light to him, it tended to prove that he was working for a salary, and in case forty per cent of the gross profits of his sales, after deducting the expenses of cartage, exceeded the weekly salary, he was to be paid the excess. It was his duty to make daily reports of sales and collections, and whether anything would be due him above his weekly wages involved an accounting and settlement. His testimony that he was authorized to retain money not due him for wages, from time to time, as he saw fit, without any accounting or settlement, was so improbable and contrary to ordinary business methods as to be entitled to very little credit. Moreover, his testimony was merely his conclusion as to his rights and not evidence as to what contract was made.

We do not see how the jury could have arrived at a different verdict, and in our opinion the evidence fully justified the verdict.

The judgment is affirmed.

Judgment affirmed.

JOHAN ONASCH

v.

AUGUSTE ZINKEL, *et al.**Opinion filed December 22, 1904.*

TRUSTS—*when trust does not result to one who pays part of purchase money.* A trust will not result in favor of one who contributes a part of the purchase money for land conveyed to another, unless it be some definite amount or some aliquot part of the whole consideration.

APPEAL from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

This was a proceeding brought in the superior court of Cook county by Auguste Zinkel and Albertine Boldt, children of Albertine Onasch, deceased, to partition a certain lot in the city of Chicago, the legal title to which had been in said Albertine Onasch at the time of her death. She left her surviving Johan Onasch, her husband, Auguste Zinkel, Albertine Boldt and Adeline Weichman, her children, and Lillie Onasch, the daughter of Charles Onasch, a deceased son, as her only heirs-at-law. The bill averred that Johan Onasch is entitled to dower in the premises, and that the children and grandchild are each seized in fee simple, by inheritance from Albertine Onasch, of an undivided one-fourth part of the premises subject to said dower.

A cross-bill was filed by Johan Onasch, which, with the answer thereto and the replication to the answer, presented the issue, whether or not there was a resulting trust in the premises, for the benefit of Johan Onasch the legal title being held by Albertine Onasch, and this was the only contested question in the case. The master to whom the cause was referred to take the evidence and report his conclusions to the court, found that there was no resulting trust, but that Johan Onasch was entitled to an estate of homestead in the prem-

ises, and recommended that homestead and dower be set off to him, and that the prayer of the bill for a partition be granted. A decree was thereupon entered in accordance with the master's report. This appeal is prosecuted by Johan Onasch.

The controlling facts are as follows: Johan Onasch and family, prior to 1882, lived in Germany. During that year, Auguste and Albertine, daughters, and Charles, a son, left Germany and came to Chicago, where they obtained work. Auguste was then twenty years of age, Albertine twenty-two and Charles fifteen. In the spring of 1884, these children sent their parents the money necessary to pay the passage of the remainder of the family to Chicago. The parents and Adeline and August, children, arrived in that city during the month of April, 1884. Adeline was then thirteen years of age and August, who pre-deceased his mother, was ten years of age. The parents had no money or property whatever. The family rented a house and commenced housekeeping. The mother kept the purse and managed the affairs of the family, and the children and Johan Onasch turned over all the money earned by them to her. Albertine had \$65 and Auguste \$20 saved when their parents arrived in Chicago, and they turned those amounts over to their mother. Albertine the daughter lived with the family until October, 1884, when she was married to Carl Boldt. During this time she was earning from \$5.50 to \$6 per week. Auguste's wages amounted to from \$3 to \$5 a week until some time in 1887, when she was married to Albert Zinkel. During this period she did not take her meals with the family, but received her board in addition to the wages for her work.

Charles Onasch earned from \$6 to \$12 per week, until 1889, when he was married. He died in 1891, leaving a daughter, Lillie Onasch, who was a party defendant below. Adeline also commenced work in 1884 as a nurse girl and earned one dollar per week at first, but her wages gradually increased until she was earning seven dollars per week prior

to her marriage to William Weichman in 1891. There is evidence that August Onasch also earned money up to the time of his death, which occurred about 1891.

Johan Onasch, the appellant, had suffered the loss of one of his arms. He obtained employment in August or September following his arrival in Chicago, carrying newspapers, which is the only occupation he had up to the time of his wife's death. The evidence is conflicting as to the amount earned by him at this work. During the earlier years it was three to four dollars per week; later his wages were higher.

Each member of the family, including the father, turned his or her wages over to the mother each week. During the first year of their life in Chicago, Mrs. Onasch engaged in sewing for any who would employ her, and her earnings were added to those of the other members of the family.

On January 14, 1886, Albertine Onasch, the mother, purchased the lot in question for \$650, and took title to herself paying \$125 down and the balance in installments out of money saved from the sources above enumerated. About a month after purchasing the lot, a small frame cottage was purchased for \$150 and moved upon the lot, the contract for the purchase being taken in the name of Johan Onasch, but the house being paid for out of the funds held by his wife. In 1889, a brick house was erected on the lot, the contract for the same being made in the name of Johan Onasch. Part of the money used in building this house was paid by Mrs. Onasch out of the savings from the wages of her husband and children which had been turned over to her, and the balance was borrowed and subsequently re-paid by her with money saved in the manner above mentioned and from rents received from the buildings on the lot. Taxes were paid from the fund held by her and the tax receipts were taken in her name.

Evidence was introduced tending to show that Albertine Onasch had made statements before her death to the effect that the property belonged to her husband. Other witnesses

testified that she said that the property had been paid for with money saved from the children's wages.

ALBERT W. MAY, for appellant.

AUGUST MARX, for appellees.

Mr. JUSTICE SCOTT delivered the opinion of the court:

Appellant by his answer admits that the title to the property was held by his wife at the time of her death, but avers that the property was in fact owned jointly by himself and wife. By his cross-bill he sets up an inconsistent claim, which is that the property was purchased and paid for with his funds and the title taken to the wife, wherefore a trust resulted by virtue of which he is the equitable owner of the whole of the property.

Onasch and wife came to this country in April, 1884. The deed for the property was made January 14, 1886. In the meantime the wife had been the custodian of the funds earned by the various members of the family, except that the daughter Albertine was married in October, 1884, and thereafter paid nothing to the family fund. This fund to which all contributed was used by the mother who incurred and paid the various household and family expenses, and out of these earnings the real estate was purchased by her with title to herself.

On the authority of *Skahen v. Irving*, 206 Ill. 597, appellant urges that the earnings of the minor children, contributed to the purchase, should be regarded as the property of the father. Whether that be true where, as here, the mother is virtually the head of the family and the wages of the minor children are paid directly to her with the father's knowledge and consent and without passing through his hands, it is unnecessary to now determine.

The fund resulted principally from the earnings of the daughters, Albertine, Auguste and Adeline, and the son,

Charles. Each of the two daughters, Albertine and Auguste, had reached her majority before the parents came from Germany. The son and the remaining daughter were minors until after the purchase of the property. Adeline in 1884 was but thirteen years of age and worked as a nurse girl at first for one dollar per week. It is manifest that she could have contributed but little to the fund. Appellant's earnings also went into the family purse, but the preponderance of the evidence shows that during the greater part of the time after his arrival and up to the date of the deed, he earned but three or four dollars per week, and never, up to that time, more than seven dollars per week. The evidence also shows that the wife, during her first year in Chicago, did sewing for persons not members of her family, and that her earnings were used in common with those of her husband and children.

If it be conceded that the money earned by the minors should be treated as the property of the father, there is still no basis upon which that earned by the mother and the two adult daughters could be so regarded. These two daughters came from Germany about eighteen months before their parents, and were in the employ of strangers and collected their own wages. No presumption that this money belonged to the father arises from the fact that they paid it to their mother, and while the daughter Albertine contributed to the family treasury for a period of only about six months after the parents came here, yet when the mother reached Chicago she received from this daughter \$65 which the latter had accumulated from her wages prior to that time, and such sums as were paid out of her wages during the six months period were in addition to that amount.

It is impossible to determine by this record what amount or what proportion of the fund that went into the purchase of this property was earned by the minor children and by the father. The cross-bill charges that the property was paid for with funds belonging solely to appellant, and avers that he is therefore the owner of the entire property.

A trust will not result to one who pays or furnishes a part only of the purchase money of land conveyed to another unless it be some definite amount or some definite part of the whole consideration, as one-half, one-third, or the like. *Reed v. Reed*, 135 Ill. 482; *Stephenson v. McClintock*, 141 id. 604; *Pickler v. Pickler*, 180 id. 168; *Devine v. Devine*, 180 id. 447; *Cline v. Cline*, 204 id. 130.

Applying this rule to the record before us, it is manifest that the decree of the court below should not be disturbed, and it will accordingly be affirmed.

Decree affirmed.

NELLIE M. OLCOTT *et al.*

v.

JOHN W. TOPE, EXR. *et al.*

Opinion filed December 22, 1904.

1. WILLS—*testator's intent must prevail though gift is not made in formal words.* The intent of the testator, if it can be clearly conceived and is not contrary to some positive rule of law, must prevail although the gift is not made in formal language.

2. SAME—*gift need not be express in order to disinherit heirs.* While mere words excluding the heirs-at-law will not suffice to disinherit them unless the estate is actually given to other persons, yet the gift need not be made in express terms but may be by necessary implication.

3. SAME—*court may look to the state of the property devised.* In construing a will the court may look to the state of the property devised in order to ascertain the intention of the testator from the language used.

4. SAME—*court may supply words obviously omitted.* In construing a will the court may supply an obvious verbal omission in order to effectuate the intention of the testator as gathered from the context of the will.

5. SAME—*when court may substitute "and" for "or."* In construing a will the court may substitute the word "and" for the word "or," where without such substitution the plain purpose of the testator as disclosed by the entire will would be defeated.

6. *SAME—estate of trustee is commensurate with his powers.* The estate of a trustee of real estate under a will is commensurate with the powers conferred upon him and the purpose to be effected by the trust; and if he is authorized to lease the property or sell the same, in his discretion, he is vested with the fee in trust.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. S. TUTTILL, Judge, presiding.

The following is the statement of facts in this case made by the Appellate Court:

“This is a bill filed by appellee, praying for a construction of the will of Anna B. Moore, deceased, and asking the direction of the court.

“Letters were issued to appellee as executor named in the instrument, and he proceeded to administer the estate. September 29, 1902, he was discharged as executor. The bill states that it became necessary to sell the real estate to pay debts; that this was done under the direction of the probate court and the debts were paid; that there was left in the hands of appellee, as executor, a balance of \$4924.76 belonging to the estate, which, it is claimed, by the terms of the will appellee should hold and manage for the purposes therein stated; that appellee is advised and believes that in accordance with the provisions of the will he should invest the money in his hands for the benefit of Charles Leslie Spikings, the amount, with its accumulation, to be paid to him when he shall reach the age of twenty-one years; that in the event of the death of said Spikings before arriving at that age the accumulated fund shall be paid to Mary Spikings, mother of Charles Leslie Spikings; that in the event of her death before the death of Charles Leslie Spikings, and of his death before reaching the age of twenty-one years, the fund shall be distributed to the next of kin and heirs-at-law of said Anna B. Moore, deceased; that it is the right and duty of appellee to invest the funds so remaining in his

hands, and the income therefrom, and to re-invest the same in such manner as will, in his judgment, be safe and promote the interests of the estate. Answers were filed by the surviving heirs and next of kin, who are nephews and nieces of Anna B. Moore, deceased, claiming that by the terms of the will any moneys remaining in appellee's hands arising from the sale of the real estate should be distributed to the legal heirs of the deceased according to the laws of descent.

"The decree appealed from finds, *inter alia*, that Mary Spikings and Charles Spikings are sole beneficiaries under the will, and that the true intent and meaning of its provisions are in accordance with the views of the executor as set out in the bill. The will is as follows:

"This memorandum I wish as my last will and testament being written and witnessed by my request. I desire Dr. J. W. Tope to act as my executor. I wish my executor to collect the rents of my farm in Leyden Tp., Cook Co., Ills., and any other indebtedness due me and pay all just debts that may be owing at my decease at the expiration of the term for which my farm is leased, I desire my executor to either lease the same again, or sell it whichever in his judgment is to the best interest of my estate, after the payment of all my debts, I desire my executor to invest the surplus rent, or in the case of the sale of the property heretofore mentioned, or any moneys derived from any source which may be owing at my decease, for the benefit of Charles Leslie Spikings, son of Charles and Mary Spikings of Chicago, Cook Co., Illinois, and to be paid to him when he shall have arrived at the age of twenty-one years.

"In case the said Charles Leslie Spikings should die before arriving at the age of twenty-one years, I desire that whatever money or property of any kind which would belong to him under the will, to go to his mother Mary Spikings, and in case of her decease prior to the decease of her son Chas. Leslie Spikings, I desire the property to be distributed to my legal heirs according to the laws of Illinois.

"Signed by me as my last will and testament this 28th day of January, 1899.

ANNA ^{her}X B. MOORE.
_{mark}

"Witnessed at her request and signed and sealed in the presence of each other this 28th day of January, 1899.

[L. S.]

H. S. HUBBELL,
118 43d St., Chicago, Ill.
MRS. M. J. BUNNELL.

“STATE OF ILLINOIS, }
County of Cook. } ss.

“Personally appeared before me, a notary public in and for said county, Anna B. Moore, and acknowledges the above will to be her free and voluntary act.

“Given under my hand and notarial seal this 29th day of January, 1899.

HENRY S. HUBBELL,
Notary Public.’

[SEAL.]

“Anna B. Moore died the day following the execution of the above instrument, which, it appears from the bill, was contested and found to be her last will and testament.”

FREDERICK MAINS, and BOWLES & BOWLES, (THOMAS E. D. BRADLEY, of counsel,) for appellants.

JESSE A. & HENRY R. BALDWIN, and JULIUS A. JOHNSON, for appellees.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The following opinion, delivered by a majority of the Branch Appellate Court, speaking through Mr. Justice FREEMAN, correctly disposes of the questions involved in this case, and is adopted as the opinion of this court:

“It is contended in behalf of the heirs-at-law of Anna B. Moore, deceased, that no intention is expressed by the language of the will to devise the fee of the land, or to dispose of the principal sum derived therefrom; that having a farm, which was leased, and assuming the income therefrom would be more than sufficient to pay her debts, the testatrix intended to leave to Charles Leslie Spikings, only the *surplus* of said rent that might be due at the time of her death, together with any other moneys then due her estate, as a modest bequest in indication of her affection for him; that the executor has a mere power of sale, and that the proceeds must be distributed among the heirs-at-law, since, as is claimed, the fee was vested in them upon the death of the testatrix.

"We are unable to agree with these contentions. It is true that 'heirs-at-law are not to be disinherited by conjecture, but only by expressed words or necessary implications,' (29 Am. & Eng. Ency. of Law,—1st ed.—p. 352,) and that a court of equity will not undertake to rectify a mistake in a will. (*Engelthaler v. Engelthaler*, 196 Ill. 230-235). But where, from the language used in the will itself, the intent of the testator can be clearly conceived and is not contrary to some positive rule of law, it must prevail, though the gift is not made in formal language. (*Powell v. McDowell*, 194 Ill. 394-397, and cases there cited).

"In the present case, there is no serious difficulty in discovering the intention of the testatrix, as expressed by the language of the will, taking into consideration all its parts. The contention of appellants is based upon the absence of words explicitly devising the real estate or its proceeds. There is no want of clearness until we come to the following: 'After the payment of all my just debts, I desire my executor to invest the surplus rent, or in case of the sale of the property heretofore mentioned, or any moneys derived from any source which may be owing at my decease for the benefit of Charles Leslie Spikings, son of Charles and Mary Spikings, of Chicago, Cook county, Illinois, and to be paid to him when he shall arrive at the age of twenty-one years.' The ambiguity in this is due, in part, to an equivocal or superfluous use of the word 'or,' and to the omission of other words implied, but not expressed, but which may be with propriety 'supplied by the court in order to effectuate the intention of the testator as gathered from the context of the will.' (2 Jarman on Wills, chap. 16, p. 486, 60; 29 Am. & Eng. Ency. of Law, 372; *Glover v. Condell*, 163 Ill. 566; *Blimm v. Gillett*, 208 id. 473; *Lash v. Lash*, 209 id. 595-604). In the last mentioned case the will provided that the executor should 'have one year after my decease to sell the land.' The court finds that the intention, collected from the context of the will, was that the wife should have the use

and benefit of the land during her natural life, and that at her death the land should be sold and the proceeds applied by the executor, as directed in the will. It is held that what the testator intended to express by that portion of his will was, that the executor should 'have one year after my (wife's) decease to sell the land;' that the word 'wife's' was omitted in drafting, and that the ambiguity or apparent inconsistency on the face of the will is ascribable to that omission, which may be supplied to effectuate the intention of the testator.

"In the case before us, the testatrix provided for the collection of the rents of her farm and any other sums due her and their application in payment of her own debts. Then she authorizes her executor either to let the farm again after the expiration of the then existing lease, or to sell it, whichever would be, in his judgment, for the best interest of the estate, thus indicating a purpose that the executor should control the farm and its proceeds after her death. Then follows the language above quoted, over the meaning of which this controversy arises. What the testatrix honestly intended to express, reading this part of her will in connection with the whole instrument, is, in substance, that the executor shall invest the surplus rent, (and a surplus might be expected if he should re-let the farm for a term of years,) or in case of the sale of the farm that he shall invest any moneys derived from such sale, or from any source, including money owing to her at the time of her decease, for the benefit of Charles Leslie Spikings, the sum, with its accumulation, to be paid to him if he lives to attain the age of twenty-one years.

"With slight changes of the reading in words, reading 'or' as 'and' where it evidently has that meaning, and supplying a verbal omission in order to effectuate the intentions of the testatrix as gathered from the context of the will, (*Lash v. Lash, supra*,) the provision in controversy will read as follows: 'After the payment of all my just debts, I desire my executor to invest the surplus rent, or, in case of the sale

of the property heretofore mentioned, *the proceeds, and* (or) any moneys derived, from any source, which may be owing at my decease, for the benefit of Charles Leslie Spikings.' We are of opinion that the italicized words we have supplied are implied from the connection and context and from the will as a whole. The word 'or,' which we read as meaning 'and,' is conceded by counsel for some of the appellants to have that meaning in this connection, and in behalf of other appellants it is claimed that it should be discarded altogether, as having no meaning. In *Boylcs v. McMurphy*, 55 Ill. 236-238-239, the word 'or,' as used in the eleventh section of the Dower act, 'shall thereupon be entitled to dower in the lands *or* share in the personal estate of her husband,' is construed in connection with the preceding sections as meaning 'and.' In *Ebey v. Adams*, 135 Ill. 80, is a discussion of the effect of the word 'or' in a will between the name of devisees and the words, 'their heirs.' In Bouvier's Law Dictionary (title 'or') it is said: 'Or' is often construed 'and,' and 'and' construed 'or' to further the intent of the parties in legacies, devises, deeds, bonds and writings,'—citing authorities.

"A will should be so construed as to give effect to every part of it without change or rejection, provided an effect can be given not inconsistent with the general intent as gathered from the entire will. (See 29 Am. & Eng. Ency. of Law,—1st ed.—p. 350). The words 'or in case of the sale of the property heretofore mentioned,' as they stand in the will, suggest a purpose and intent of the testatrix not fully stated,—a verbal omission which is implied. (*Young v. Harkleroad*, 166 Ill. 318-325). To give effect to these words requires their construction in connection with the rest of the instrument. They distinctly refer back to the power of sale given to the executor in the words which precede them. The 'property heretofore mentioned' is the farm, which the executor had just been authorized and directed to either lease or sell; if leased, the executor is authorized and

directed to invest the surplus rent. If sold, the testatrix evidently intends, as the context indicates, to provide for the investment and disposition of the proceeds in the same way, together with any money derived from any other source, otherwise the reference to 'the sale of the property heretofore mentioned,' in that connection, would have no meaning. Having provided for the disposition of the surplus rents in the case of re-letting, the disposition of the proceeds in case of the other alternative, a sale, was the next proper, orderly and logical thing to be provided for in that connection. This provision she evidently intended to make and supposed she had made, and though she failed to employ apt language, we are of opinion the intention is sufficiently manifest in the language used that both surplus rents and proceeds of 'sale of property heretofore mentioned' are alike to be invested for Charles Leslie Spikings, and to be paid to him when he becomes of age. This conclusion is justified, if it needs justification, by phraseology employed in the concluding paragraph of the will. As we have said, and it is perfectly apparent from the context, the testatrix refers to the farm in the words, 'in case of the sale of the property heretofore mentioned,' using the word 'property' to designate the only real estate mentioned in the will. In the concluding paragraph of her will she uses the same word evidently in the same sense, where she says, 'I desire that whatever money or property of any kind which may belong to him (Spikings) under the will, to go,' etc., thus distinguishing between the 'money,' which would so belong to him and the 'property,' or farm, which she evidently expects and intends should belong to him also. The rents and other indebtedness are specifically given to Spikings in language not questionable, and are properly referred to as 'money' in distinction to the farm, which is spoken of as 'property.' But, except in the controverted part of the will above considered, there is no specific bequest to Spikings of any property except the 'money' to be collected from rents and

debts due her. Yet the testatrix speaks not only of 'money,' but of 'property' also, as what 'would belong to him under the will,' unless he 'should die before arriving at the age of twenty-one years,' thus indicating clearly that such was her intention, and also, as we think, tending to show that she supposed the language before employed expressed such intention. 'The inquiry always is what did the testator intend, and the answer is to be sought for and found in the intentions of the will, taking into consideration all its parts, and giving to the language the sense in which it was used by the testator. For this purpose the court will look to every provision of the will, the better to understand the plan of distribution adopted and the purpose of the testator in making the particular provisions under consideration.' (*Ebey v. Adams*, 135 Ill. 80-86).

"The intent of the testatrix in the case before us is further evidenced by the later language of the will, where it is provided that the 'property,' using the same word before applied to the farm in distinction from the money referred to in the will, shall be distributed to her legal heirs according to law only in case of the contingency therein stated. While mere words excluding the heirs-at-law will not suffice to disinherit unless the estate is actually given to someone else, such gift need not be in express terms, 'but may be by necessary implication,' (*Powell v. McDowell*, 194 Ill. 394,) and the words of exclusion or of contingent inclusion may alike serve to indicate the intention of the testatrix and aid in the interpretation of her will. The instrument, as a whole, shows beyond cavil an intention to provide for the legatee, Spikings, and that the property, real and personal, should revert to the heirs only in the event of his death, and that of his mother. The decree finds that it became necessary to sell the real estate to pay debts, the personal property not sufficing. The testatrix, apparently anticipating such a contingency, gave the executor power to rent or sell for the benefit of her estate, which she follows with a statement that 'after the

payment of all my just debts, I desire my executor to invest the surplus rents or in case of the sale,' etc. As the sale of the realty was necessary to pay her debts, it is apparent that, unless he is entitled to the proceeds of the farm, Spikings will get nothing under the will. The rule is well recognized that, in the construction of a will, the court will look at the state of the property devised in endeavoring to ascertain from the language used the intention of the testator. (*Fisher v. Fairbank*, 188 Ill. 187-191). The testatrix might well have had in mind the probability that the farm would have to be sold to pay debts, and in that event, under the construction contended for by the appellants, the whole purpose and intention of the will would have been subverted and the only legatees mentioned would take nothing, while the heirs, whom she specifically postpones in their favor, would take the whole of the estate. Such was not the intention of the testatrix as indicated in the will.

"It is claimed by appellants' counsel that the testatrix conferred upon the executor a mere power to lease or sell at the expiration of the term for which the farm was rented, and no legal estate in the land, and that, hence, the title descended to the heirs-at-law, who are therefore entitled to the proceeds. The estate of a trustee in real estate is commensurate with the powers conferred by the trust and the purposes to be effected by it. 'If a trustee is required to grant a fee, the fee must be conferred upon him.' (*Lawrence v. Lawrence*, 181 Ill. 248-251; *Lash v. Lash*, 209 id. 595-605). In *Kirkland v. Cox*, 94 Ill. 400-412, it is said, quoting from Perry on Trusts, sec. 305: 'If the trustee is to exercise any discretion in the management of the estate, in the investment of the proceeds or the principal or in the application of the income, or if the purpose of the trust is to protect the estate for a given time, or until the death of someone, or until division,' 'the operation of the Statute of Uses is excluded and the trusts or uses remain mere equitable estates.' And it is further said, quoting from the same

author, in section 315: "Thus, if land is conveyed to trustees without the word 'heirs,' in trust to sell, they must have the fee, otherwise they could not sell. The construction would be the same if the trust was to sell the whole or a part, for no purchasers would be safe unless they could have the fee, and a trust to convey or lease, at discretion, would be subject to the same rule.' In the case at bar the executor is authorized to sell or lease at discretion, and, therefore, was vested with the fee in trust.

"The decree of the circuit court must be affirmed."

Accordingly, the judgment of the Appellate Court, affirming the decree of the circuit court, is affirmed.

Judgment affirmed.

C. W. HAHN

v.

B. E. BROOKS.

Opinion filed December 22, 1904.

1. FRAUD—*what not necessary to maintain action for deceit to recover amount of encumbrance.* To maintain an action of deceit for amount of an encumbrance upon property falsely represented to be unencumbered, it is not essential that plaintiff shall have removed the encumbrance or that his title shall have been swept away thereby.

2. SAME—*when principal is responsible for an agent's fraud.* A land owner who refers a prospective buyer to his agent for information as to the title, representing him to be a reliable man, is responsible for the false representations of such agent with respect to the title.

3. EVIDENCE—*what is competent in action for deceit—damages.* In an action of deceit to recover the amount of an encumbrance upon land falsely represented to be unencumbered, proof of the value of the land is proper, since the measure of damages is the amount of the encumbrance if it is less than the value of the land.

4. APPEALS AND ERRORS—*when party cannot object that fact is not proved.* One cannot complain, on appeal, that a fact was not proved if proper proof thereof was prevented by his objection.

APPEAL from the Appellate Court for the Third District;—heard in that court on writ of error to the Circuit Court of Coles county; the Hon. M. W. THOMPSON, Judge, presiding.

A. C. ANDERSON, and CHARLES C. LEE, for appellant.

CRAIG & KINZEL, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

B. E. Brooks recovered a judgment in the circuit court of Coles county against C. W. Hahl and T. H. Montague for the amount of an encumbrance on six hundred and five acres of land in Harris county, Texas, in an action on the case for fraud and deceit in representing the land to be unencumbered. Upon a writ of error from the Appellate Court for the Third District the judgment was affirmed, and C. W. Hahl appealed from the judgment of the Appellate Court.

The defendant Montague appeared but did not plead to the action, and the defendant Hahl filed a plea of not guilty. After the plaintiff had introduced his evidence, the defendant Hahl asked the court to give an instruction directing the jury to return a verdict of not guilty, but the court denied the motion. No evidence was offered by the defendants, and the question whether the court was right in refusing to give the peremptory instruction and submitting the issue to the jury is the only one in the case.

The evidence on the part of the plaintiff was to the following effect: Plaintiff, a resident of this State, went to Texas with the defendant Montague and was shown the land in question by Montague, as agent for Hahl. Plaintiff offered to trade three horses which he had at home to Hahl for the land and to give a note and mortgage for \$1040 on the north three hundred acres. He was to have a warranty deed

and perfect title. The offer was accepted, and plaintiff went to find Mr. Hayes, an attorney from Illinois, to examine the title. He did not find Mr. Hayes, and came back and told Hahl that he would have to be assured by some good man that the title was all right. An abstract was to be furnished, and Hahl said that it was with L. B. Moody, who was a good, reliable man; that he could go to Moody and he would tell him the facts. Plaintiff went to Moody, who told him that he had examined the abstract before but would examine it again. He pronounced the title good, and told plaintiff the land was unencumbered except by taxes. Moody held the title to the land in trust for Hahl and a deed was made out from Moody to plaintiff. It was getting late and the deed was handed to plaintiff in a rather dark room. He could not read well and asked Hahl to read the deed. He read it, but did not read anything about a mortgage. Plaintiff then handed the deed to Montague and asked him to read it, and Montague read it in the same way. The land was subject to a purchase money mortgage of \$2117.50 and the deed was made subject to that mortgage. Whether the deed was mis-read or the clause with reference to the encumbrance was inserted afterward does not appear. Plaintiff gave his note for \$1040, secured by trust deed, and executed a bond for \$2000 to deliver the horses at his home.

It is contended that the evidence did not fairly tend to prove the cause of action, because it did not show that the plaintiff relied upon the false representations and was deceived by them. Such a proposition as that cannot be sustained. Plaintiff made the trade for unencumbered land and depended upon the false representations of the defendants and Moody, the agent and trustee for Hahl.

It is also argued that the plaintiff could not recover until he had removed the encumbrance or his title had been swept away by it. We know of no authority for that proposition. Plaintiff suffered damages to the amount of the encumbrance if the land was sufficient security for it. The amount of the

damages was fixed and determined and the right of action accrued at once.

But it is said that plaintiff failed to show the value of the land and that it was not more than the encumbrance; that it was necessary to prove the value of the land, because otherwise it could not be determined how much the damage was. Plaintiff attempted to prove the value of the land, but the defendants objected and the objection was sustained. It would have been proper to prove the value for the reason that the measure of damages is the amount of the encumbrance if less than the value of the land. (14 Am. & Eng. Ency. of Law,—2d ed.—185.) But appellant cannot be heard to object that a fact was not proved where the proof was prevented by his objection.

Appellant, Hahl, was responsible for the false and fraudulent representations made by Moody within the scope of his agency and because he referred the plaintiff to Moody for information as to the state of the title. He was as much responsible for the falsehood and fraud as if he had been guilty of them personally. (14 Am. & Eng. Ency. of Law,—2d ed.—156.)) The evidence also proved that he was directly guilty of fraud himself in either falsely reading the deed or making an addition to it afterward.

Appellee moves the court to award damages because the appeal was taken for delay, and that motion will be allowed. We cannot see how there could have been any hopes of obtaining a reversal of the judgment, and ten per cent on the amount of the judgment will be assessed as damages.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

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ELIZABETH L. WATHEN

v.

ALLISON DITCH DISTRICT No. 2.

Opinion filed December 22, 1904.

DRAINAGE—*when a prima facie case cannot prevail in drainage assessment.* The *prima facie* case of benefits made by the assessment roll in a drainage assessment case cannot prevail where the competent evidence in the case clearly shows the assessment grossly excessive.

APPEAL from the County Court of Lawrence county;
the Hon. J. D. MADDING, Judge, presiding.

TOHILL & KINGSBURY, for appellant.

S. B. ROWLAND, and C. J. BORDEN, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The jury empaneled by the county court of Lawrence county, under the provisions of paragraph 45 of chapter 42, (2 Starr & Cur. Stat. 1896, p. 1509,) to assess the benefits to the lands embraced within Allison Ditch District No. 2, in said county, by the construction of the drainage ditch, returned a total assessment of \$627.40 for benefits to 214.90 acres of land belonging to the appellant. The lands consisted of two tracts, described as follows: The fractional north-west quarter of section 27, town 4, north, range 10, west, 148.65 acres, which was assessed for \$348.65, and the fractional north half of the south-west quarter of said section 27, containing 66.25 acres, which was assessed for \$278.75. The appellant filed objections to the assessment, in substance, that the lands were so situated that they were not in any way benefited by the ditch except for sanitary purposes, and that each tract was assessed for benefits in a greater amount than any benefits derived from the work. The jury was re-con-

vened and the evidence bearing upon the objections was submitted, the result being a reduction of the benefits assessed to the fractional north-west quarter to \$292.65 and a reduction of the benefits to the fractional north half of the south-west quarter to \$262.75, being a total reduction of \$72. The appellant contended that it was shown by the evidence that the said lands were not benefited to any extent by the construction of the ditch, except, possibly, for sanitary purposes, and has perfected this appeal.

It was stipulated that a tax of twenty-five cents per acre was the extent of the benefits conferred on the land for sanitary purposes.

Five witnesses gave testimony on the hearing, all of whom were introduced by the appellant. The northernmost end of the ditch, being the starting point thereof, is between one-third and one-half mile south of the nearest part of the appellant's lands and south of the westernmost limits thereof.

There was no conflict in the testimony of the different witnesses. It appeared from their testimony that the greater part of the appellant's lands slopes toward the east and south-east; that a ridge or elevation extends from north to south across the lands and somewhat west of the center of the tracts, and that all of the water falling or coming on the lands east of the ridge flows to the east and the south and does not reach the head of the ditch, and could not be carried there against the natural course of drainage except by the construction of a long, expensive ditch through the ridge. The testimony also showed that the only portion of the land which needed drainage west of the ridge was in the south-west corner, where there was a small pond or depression, which, in occasional seasons only, rendered an acre and a half or two acres of the land too wet for cultivation; that to drain this portion of the land would require the construction of a ditch one-half mile in length in order to reach the head of the district ditch. Some of the witnesses thought such a ditch would drain the depression or pond only, and

one witness thought that possibly twelve acres in the southwest corner might be benefited by the construction of a ditch from the pond south to the head of the drainage ditch, but all agreed that the expense of digging the ditch from the pond to the drainage ditch would, when the small tract benefited was considered, be too great to justify that course. The witnesses were all farmers. Four of them had cultivated the lands of appellant,—two of them for five years, one for two seasons, and the other was the husband of appellant, who had known or cultivated all or a portion of the farm for more than thirty years. The other of the five witnesses had lived for twelve years within one-fourth mile of the lands. The testimony of these witnesses, if there was no reason for refusing it weight and credit, plainly demonstrated that the assessment was grossly excessive. There is no other testimony to be found in the record.

Counsel for the appellee district say this testimony is not sufficient to overcome the *prima facie* case made by the assessment roll returned by the jury after the personal view of the premises by them, "and the evidence of the engineers." The assessment roll makes a *prima facie* case that the assessment is correct, and is sufficient to establish that fact if not rebutted. But here the objector produced evidence showing the assessment to be unjust. Such proof being produced, the presumption was not, of itself, sufficient to authorize the confirmation of the assessment, but the case made by the proofs offered by the objector must be met by other testimony. *Prima facie* evidence means evidence which is sufficient to establish the fact unless rebutted. (22 Am. & Eng. Ency. of Law,—2d ed.—1294.) A *prima facie* case cannot prevail if rebutted or the contrary shown by competent proof. *Lovell v. Drainage District*, 159 Ill. 188.

It does not appear from the record that the engineer testified on the hearing before the jury, nor do we find anything in the record to show that the engineer at any time took any action whatever with reference to these tracts of land.

The testimony submitted to the jury plainly and fully rebutted the presumption arising from the return of the assessment roll, and the trial court erred in refusing to set aside the verdict and grant a new trial.

The judgment must be and is reversed, and the cause will be remanded for such other and further proceedings as to law and justice shall appertain.

Reversed and remanded.

FRANK D. THOMAS, Admr.

v.

JAMES F. WATERS *et al.*

Opinion filed December 22, 1904.

APPEALS AND ERRORS—*when freehold is not involved.* An appeal from an order dismissing a petition by an administrator to sell land to pay debts does not involve a freehold where there was no claim of an adverse title, the only question being whether the land was subject to sale for the payment of debts of the estate.

APPEAL, from the County Court of Pope county; the Hon. W. A. WHITESIDE, Judge, presiding.

D. G. THOMPSON, and W. D. BEAMES, for appellant.

WM. H. MOORE, and CHARLES DURFEE, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The county court of Pope county dismissed the petition of appellant for an order to sell lands owned by Pleasant G. Waters at the time of his death to pay debts of his estate, and this appeal was taken.

The defendants were the heirs-at-law of Pleasant G. Waters and a tenant occupying the land under them. The petition alleged that Pleasant G. Waters owned the land at

the time of his death, that the defendants were his heirs and the said tenant, and that the heirs were in possession of the land. The defendants, by their answer, admitted the ownership of the land by Pleasant G. Waters, that they inherited the same from him and that they were in possession, as alleged in the petition. There was no claim of an adverse title by any one to be adjudicated, and the only controversy was whether the land was subject to sale for the payment of debts of the estate. No freehold is involved in such a case, and we have no jurisdiction to hear an appeal from the order of dismissal. *Richie v. Cox*, 188 Ill. 276.

The appeal is dismissed.

Appeal dismissed.

AMAZIAH HAYNER

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Opinion filed December 22, 1904.

1. CRIMINAL LAW—it is not a matter of right for private attorney to assist prosecution. Granting permission to an attorney whose services are gratuitous or paid for by private parties to appear as an assistant to the State's attorney is a matter resting in the discretion of the court, whose duty it is to see that the criminal law is not used to gratify personal ends and to permit such assistance, only, as fairness and justice may require, without oppression to defendant.

2. SAME—section 6a of act of 1903 relating to State's attorneys construed. Section 6a of the act regarding State's attorneys, added in 1903, (Laws of 1903, p. 85,) prohibiting State's attorneys from receiving any reward from private persons for performance of official duties, does not limit the court's discretion to permit counsel, paid by private parties, to assist the State's attorney in prosecuting a criminal case.

3. SAME—when homicide in defense of habitation is justifiable. As distinguished from homicide in self-defense in a public place, where a reasonable belief of danger to life or great bodily injury is necessary to a justification, homicide in defense of habitation is justifiable if the victim was manifestly intending, and endeavoring in a violent and tumultuous manner, to enter the habitation for the pur-

pose of assaulting or offering personal violence to any person dwelling therein.

4. SAME—one may, if necessary, take life in defense of habitation. A man may, within his own house, use all needful force to keep an aggressor out, even to the taking of such aggressor's life.

5. SAME—peril of life or of great bodily harm not essential to justify defense of habitation. A man in his own habitation may resist with force an unlawful, violent entry by one whose purpose is to assault or offer violence to him, even to the extent of taking the aggressor's life, although the circumstances may not be such as to justify a belief of actual peril to life or great bodily harm.

6. INSTRUCTIONS—when instructions should not be given. Instructions in a criminal case which are not based upon the evidence, or which are misleading, useless, irrelevant or confusing, should not be given.

7. SAME—when instruction as to duty of jury in considering evidence is improper. An instruction telling the jury that their power and duty to judge the effect of the evidence are not arbitrary, but should be exercised with legal discretion and in subordination to the rules of evidence, is improper, where there is no explanation of legal discretion nor of the rules of evidence to which their judgment should be subordinate.

8. SAME—instruction permitting the jury to fix punishment for manslaughter is erroneous. An instruction informing the jury that one who is guilty of manslaughter is to be imprisoned for his natural life or any number of years, and if they found accused guilty they should fix his punishment by their verdict, is erroneous.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. AXEL CHYTRAUS, Judge, presiding.

W. P. BLACK, and C. D. F. SMITH, for plaintiff in error.

H. J. HAMLIN, Attorney General, CHARLES S. DENEEN, State's Attorney, and HARRY OLSON, for the People.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Amaziah Hayner, plaintiff in error, was indicted in the criminal court of Cook county for the murder of Henry Martin. A trial resulted in a disagreement of the jury, but on a second trial a verdict was returned finding the defend-

ant guilty of manslaughter and fixing his punishment at imprisonment in the penitentiary for a term of one year. The court disregarded that part of the verdict fixing the term of imprisonment and sentenced him to confinement in the penitentiary for an indeterminate period, in accordance with the statute.

The death of Henry Martin resulted from a shot from a revolver fired by the defendant in defendant's kitchen in the rear flat on the second floor of No. 4433 State street, in Chicago. The only persons present in the room at the time were Martin and the defendant, and the evidence, except the testimony of the defendant, was confined to what occurred previously. The buildings numbered 4431 and 4433 State street were occupied on the lower floors by storerooms. Above the storerooms in each building were three floors finished as flats and divided into front and rear flats. Above the storeroom in 4433 the rear flat was occupied by the defendant, Hayner, a widower, and his daughter, a stenographer and typewriter, and he had charge of the flats in that building as janitor. The next flat above was occupied by Mrs. Lawson and the rear top flat by Mrs. Clay. Above the storeroom of 4431 the rear flat was occupied by Mrs. Kenny, the next by Mrs. Draper and the top flat by Mrs. Beard. There were rear porches and stairways, above each other, to both buildings, with an outer railing, and a railing extending across the porches separating the buildings. On the afternoon of September 4, 1902, the defendant called upon Mrs. Beard at her flat on the top floor of No. 4431 for the key of a front flat in No. 4433, from which she had recently removed. He sat for a time on the railing or banister between the porches of Mrs. Clay and Mrs. Beard, talking with the latter. Martin was a business agent or walking delegate of a carpenters' union, and at that time came up the stairway to Mrs. Beard's porch. He was intoxicated, and when asked what he wanted said he was looking for a carpenter by the name of Garlof. Mrs. Beard told him that Garlof did not

live there and requested him to go down-stairs. He inquired the name of the building, and she replied that she did not think it had any, and referred the question to the defendant, who said he had lived there fourteen years and that it had no name, and he informed Martin that Garlof had moved farther south on State street. Mrs. Beard requested Martin to go down-stairs, and he replied with profane and obscene language and refused to go. Mrs. Beard and defendant tried to persuade him to leave, but he would not. He walked to the dividing railing where the defendant sat and stepped over it to Mrs. Clay's porch, and as he went over he called Mrs. Beard the vilest name that can be applied to a woman, accompanied with an oath. The defendant became very much excited and took hold of a step-ladder, saying to Martin that he had insulted the woman as long as he could stand it, and pushed the ladder sideways against Martin. Defendant then dropped the ladder and picked up a broom. The evidence was contradictory as to whether at this time Martin struck the defendant or said that he did not want to fight. Defendant attempted to strike Martin with the broom but did not hit him, and the broom went out of his hands across the porch. Mrs. Clay then tried to get Martin to go down-stairs and agreed to go with him. They started to go down together, and when they had gone three or four steps Martin stopped and wanted to go back, but she persuaded him to go on. When they reached the bottom of that flight of stairs they turned on the porch between the railing and the brick wall and went to the head of the next stairway, which descended to the porch on the second floor, where defendant's apartments were. The defendant came down-stairs, and as Mrs. Clay and Martin stood at the head of that stairway defendant laid his hand on the railing near the door and jumped over, reaching the stairway three or four steps farther down in front of them. Martin then kicked the defendant twice in the back as he went down the stairs, Martin following him to the bottom of the stairs, when Mrs. Clay went back to her

own flat above. The defendant went to his own door and went into his kitchen, opening a screen door, which shut behind him. He went on into the bed-room and got a revolver which he kept there, and returned to the kitchen door and pushed the screen open. When Martin reached the bottom of the stairs on that floor he was near a passageway leading to State street, by which he could go out the way he came in. Instead of doing that he turned back a few steps to the door of the defendant and took hold of the screen door with his left hand, holding it partly open. Defendant asked him what he was doing there, and told him to get out,—that he did not want any further trouble with him. Defendant had the revolver in his hand, hanging by his side and swinging it around. As Martin stood there he said to the defendant: "Shoot, damn you! shoot!" The defendant thereupon fired a shot, which made a flesh wound on the upper part of Martin's arm with which he was holding the door. Martin's arm slipped down the door, and, as a witness described it, he lunged forward into the kitchen, the screen door closing behind him. Nothing was seen from the outside after that, except through the screen door, and the only witness who saw anything testified that he saw Martin's arm going back and forth but was unable to state what he was doing. The first shot was followed very soon by another, which severed the femoral artery in the left leg and proved fatal. There was a great quantity of blood on the floor near the middle of the kitchen, and about the time of the shots Martin was heard to say: "You have shot me; give me a rag." There was testimony that the defendant, as he went down the stairs, said: "I will show you; I will shoot you;" but this was contradicted. The defendant was seventy-three years of age and weighed about one hundred and forty-seven pounds. Martin was thirty-six years old, and weighed, according to the testimony of his widow, one hundred and eighty pounds. The coroner's physician testified that he weighed two hundred and ten pounds. The parties had not been acquainted with each

other and there was no hostility between them, except such as was aroused by the conduct of Martin on this occasion. The defendant testified that he fired the first shot when Martin said "shoot," not intending to injure him but only to frighten him, and the wound in the arm would have had no serious effect. He testified that following that first shot Martin came into the room towards him and he backed up and Martin attempted to strike him; that Martin was close to him and he was holding the pistol down; that it was an automatic revolver, and he thought that in his excitement he pulled the trigger without knowing it.

The first error assigned is, that the court permitted W. S. Elliott, Jr., an attorney not connected with the office of the State's attorney but hired and paid by the carpenters' union, to assist the State's attorney and take a prominent part in the trial. When the objection was made it was agreed that Mr. Elliott would testify that the carpenters' union had paid him a retainer, amounting to several hundred dollars, for his services in the prosecution of the defendant, and had become liable to pay him a considerable sum as fees in such prosecution. It is not the right of an attorney to appear as assistant of the State's attorney, whether his services are gratuitous or paid for by private parties, but the State's attorney, as a public officer, must have the direction and assume the responsibility of the prosecution. It would be manifestly improper to permit counsel paid by private parties to supplant the constituted officer of the law and to assume the management of the case, but we do not think it is beyond the power of the court to permit counsel paid by private parties to assist the State's attorney where there is no oppression of the defendant or injustice to him. In granting such permission the court should see that the criminal law is not being used to gratify malice or personal ends, but cases frequently arise where the administration of public justice requires that the State's attorney should have assistance. There are cases where the State's attorney is clearly outclassed and over-

matched by counsel for the defendant. Such matters must be left largely to the discretion of the court, whose duty it is to prevent oppression of the defendant and to permit such assistance as fairness and justice may require. It might be a wrong and oppression to a defendant to permit able and experienced counsel employed by private parties to assist a competent State's attorney in a contest with inexperienced or inefficient counsel for the defense.

Counsel for plaintiff in error call attention to the new section added in 1903 to the act in regard to attorneys general and State's attorneys, which provides that the State's attorney shall not receive any fee or reward from or in behalf of any private person for any services within his official duties, and shall not be retained or employed, except for the public, in a civil case depending upon the same state of facts on which a criminal prosecution shall depend. (Laws of 1903, p. 85.) It is insisted that in view of this statute the law should be that counsel assisting the State's attorney should be as unprejudiced and impartial as a public prosecutor. We do not think the statute was intended to prohibit the court, in the exercise of a sound discretion, from permitting counsel paid by private parties to assist the State's attorney where it may seem necessary. It must be presumed that the discretion was properly exercised in this case, and we find nothing in the record to indicate the contrary.

The instructions are complained of, and upon inspection we find they do not present a connected or consistent theory of the rights of the defendant in the defense of his habitation. The defense was that the fatal shot was fired in opposing an entry into the defendant's habitation against his will, for the purpose of assaulting him. On the part of the defendant the court instructed the jury that a homicide is justified when the killing is in the defense of one into whose dwelling the person killed forces his way against the protest of the occupant, for the purpose of assaulting or offering personal violence to such person; that if Martin had, with violence

and against the protest of defendant, entered the place of residence of defendant, and the defendant in good faith reasonably believed that Martin intended to offer personal violence to him or assault him, and Martin threatened then and there, with word or gesture, to assault the defendant, and the defendant acted under the influence of fears of personal violence or an assault and not in a spirit of revenge, the shooting was justifiable and the jury should acquit the defendant. In giving instructions at the request of the prosecution the court ignored all distinctions between a homicide committed in self-defense in a public place, where both parties have equal rights, and a homicide committed by a person in his own habitation of one entering it, against his will, for the purpose of assaulting or offering personal violence to him. Accordingly, the jury were told that the defendant, in order to justify the killing on the ground that it was in defense of habitation, property or person, must in good faith have believed that the killing was necessary either to preserve his own life or prevent his receiving great bodily harm, and that if the circumstances would not induce a reasonable person to believe, and the defendant did not believe, he was in danger of losing his own life or was in great bodily danger, then he had not established his defense. These instructions stated the law to be, that the defendant had no right to take the life of Martin unless it was apparently necessary in order to prevent the commission of a felony or to defend himself against loss of life or great bodily harm.

There are text books and decisions which state the rule as given in these instructions, making no distinction whatever between the right of self-defense generally and the right of defense by a person in his own habitation, and it has been said that the extent of the right to defend the habitation and persons in it is involved in some obscurity and confusion. That, however, cannot be said of this State, where, both by statute and decision, the right has been clearly defined. Section 148 of division I of the Criminal Code defines justifi-

able homicide as follows: "Justifiable homicide is the killing of a human being in necessary self-defense, or in the defense of habitation, property or person, against one who manifestly intends or endeavors by violence or surprise to commit a known felony, such as murder, rape, robbery, burglary and the like, upon either person or property, or against any person or persons who manifestly intend and endeavor, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein. A bare fear of any of these offenses, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge." (Hurd's Stat. 1899, p. 595.) Section 149 relates only to the necessary self-defense mentioned in section 148, as is apparent from its language. That section provides that if a person kill another in self-defense, it must appear that the danger was so urgent or pressing that in order to save his own life or to prevent great bodily harm the killing of the other was absolutely necessary, and also that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given. Section 148 declares homicide justifiable in the defense of habitation, property or person against any person who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein. An assault or offer of personal violence does not necessarily imply danger to life or great bodily harm. In *Reins v. People*, 30 Ill. 256, the judgment of conviction was reversed and it was held that the first instruction asked by the defendant should have been given. That instruction was based upon the statute,

and declared the law to be that if defendant, Reins, in defense of himself, inflicted upon deceased the wounds or stabs which caused his death, while the deceased was manifestly intending and endeavoring, in a violent manner, to enter the habitation of the witness Mrs. Foley for the purpose of assaulting or offering personal violence to the defendant, Reins, being therein, the killing was justifiable and the jury must acquit the defendant. In *Davison v. People*, 90 Ill. 221, the court held that a mere trespass to property would not justify the killing of the trespasser, but expressed the view of the court as to habitation by saying (p. 229): "A man's house is his castle, and he may defend it even to the taking of life, if necessary or apparently necessary to prevent persons from forcibly entering it against his will and when warned not to enter and to desist from the use of force." We think, also, the general rule is, that a person within his own house may exercise all needful force to keep an aggressor out, even to the taking of his life. A man in his own habitation may resist force with force, and oppose an unlawful entry against his will by one who in a violent manner attempts to enter with a purpose of assaulting or offering violence to him, even to the extent of taking life, although the circumstances may not be such as to justify a belief that there was actual peril of life or great bodily harm. (2 Bishop on Crim. Law, sec. 653; 2 Wharton on Crim. Law, sec. 1024; *Pond v. Pond*, 8 Mich. 150.) The instructions were in conflict with each other, and those given at the request of the prosecution were not correct.

It is said by counsel for the People that the defendant was clearly guilty and therefore could not be prejudiced by incorrect instructions. We cannot say that there must necessarily have been a verdict of guilty. The defendant had a right to the judgment of the jury under correct instructions as to the law. He had a right to have his testimony and all the circumstances considered by the jury for the purpose of determining whether Martin attempted to enter his kitchen

against his will for the purpose of assaulting him, and whether, in reasonably resisting such entrance, he fired the fatal shot, accidentally or otherwise. It cannot be said that the erroneous instructions were not prejudicial.

There were a great many instructions given at the request of the People introducing to the jury all sorts of legal propositions inconsistent with the facts of the case or not founded upon them. For instance, the tenth stated the law in case the evidence showed that Martin attacked the defendant and afterward abandoned the attack and retreated and the defendant became the aggressor and pursued and killed Martin. There was no evidence to which the instruction could be applied. The instructions given at the request of the People were thirty-two in number,—more than three times the number given at the instance of the defendant. Many of them were wholly uncalled for. A few plain and simple instructions which the jury could understand were all that were required, and the practice of encumbering the record and troubling the jury with useless and irrelevant instructions is a pernicious one, frequently condemned. *Dunn v. People*, 109 Ill. 635; 11 Ency. of Pl. & Pr. 150.

The ninth instruction given at the request of the People was abstract in form, assuming to state a case where "one," evidently intended to be applied to the defendant, assaulted "another," intended to be applied by the jury to Martin; but as the instruction proceeded, the terms "one" and "another" were transposed, and the defendant became "another" and Martin became "one." While we can see what was meant, the instruction was confusing and misleading and should not have been given.

Instruction numbered 37 is criticised, and counsel for the People concede that the criticism is just. The jury were told that their power and duty to judge the effect of the evidence were not arbitrary, but should be exercised with legal discretion and in subordination to the rules of evidence. There was no explanation what constituted legal discretion or what

rules of evidence their judgment should be subordinate to. The question in the case was whether the killing was done in reasonably resisting the entry of Martin in a violent manner into the dwelling house of defendant for the purpose of assaulting him, and the law on that subject could have been stated to the jury very clearly and briefly.

Instruction numbered 33 given at the instance of the People told the jury that whoever is guilty of manslaughter is to be imprisoned for his natural life or any number of years, and if the accused should be found guilty the jury should fix his punishment by their verdict. The jury, in obedience to the instruction, fixed the punishment at one year in the penitentiary. The court disregarded that part of the verdict, and the defendant filed affidavits of three jurors to the effect that the verdict was a compromise, by which the defendant was found guilty provided all should agree that the punishment should not continue longer than one year; that the verdict of guilty would not have been returned except for that agreement, and that the jurors in question would never have consented to a verdict of guilty if they had not understood that they had the right to fix the punishment as they were instructed and had fixed it at one year. Affidavits of jurors cannot be received to avoid their verdict. (*Sanitary District v. Cullerton*, 147 Ill. 385.) Whether that rule applies to the particular circumstances of this case or not, we think the erroneous instruction permitting the jury to fix the term may very likely have been harmful to the defendant. The jury fixed the shortest term possible under the law, while the court imposed a sentence which was, in effect, for the maximum term, unless shortened in accordance with the Parole law. The record does not show that the error in giving the instruction was not prejudicial.

The judgment is reversed and the cause remanded.

Reversed and remanded.

ANNA MURPHY

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Opinion filed December 22, 1904.

1. EVIDENCE—*what essential to admission of church records.* It is essential to the admission of church records in evidence, in any event, that it be made to appear that the entries were made by the person whose duty it was to make them.

2. MARRIAGE—*it is not presumed that party was guilty of bigamy.* It will not be presumed, in aid of an alleged common law marriage, that the subsequent ceremonial marriage of one of the parties was a bigamous one, since the presumption is in favor of his innocence and of the validity of the marriage formally solemnized.

3. SAME—*when alleged statements tending to prove a common law marriage are overcome.* Alleged oral statements by the father as to the legitimacy of a child, relied upon as showing a common law marriage with her mother, are overcome by proof that he described her in his will as the daughter of the woman who "claims said Anna to be my child," and by the fact that such woman, neither in his lifetime nor after his death, ever asserted any legal rights as his wife or widow.

APPEAL from the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

J. S. DUDLEY, for appellant.

H. J. HAMLIN, Attorney General, (E. M. ASHCRAFT, of counsel,) for the People.

Mr. JUSTICE BOGGS delivered the opinion of the court:

Bernard VonGlahn, late of Cook county, deceased, by his will dated December 24, 1901, bequeathed the sum of \$8000 to Anna Murphy, the appellant. An inheritance tax of three dollars per \$100 on said legacy of \$8000, being the sum of \$240, was ordered by the county court of Cook county to be deducted by the executor of said deceased from said legacy and paid to the county treasurer of Cook county.

Section 1 of the Revenue act (3 Starr & Cur. Stat. p. 3528,) directs that the rate of inheritance tax on legacies to a niece of the testator shall be two dollars on each \$100 in excess of \$2000. The appellant claimed that Hildebrand August VonGlahn, a brother of the testator, and one Mrs. Martha McCabe, a widow, were husband and wife and that she was born of that union, and was therefore the niece of the testator and entitled to have \$2000 of said legacy free from inheritance tax, and that only two dollars on the \$100 of the remainder of said legacy could be lawfully deducted therefrom. Upon a hearing the county court of Cook county declared that it was not established that Hildebrand August VonGlahn and Mrs. Martha McCabe, the mother of appellant, were husband and wife, and consequently that it did not appear that appellant was the niece of the said Bernard VonGlahn, and directed the inheritance tax to be deducted from the legacy and paid into the county treasury at the rate of three dollars on each \$100 of the full amount of the legacy.

The appellant was born of the body of said Martha McCabe, and it was quite well established that said Hildebrand August VonGlahn was her father, but we agree with the county court that it was not shown that the marriage relation existed between said Hildebrand August VonGlahn and said Martha McCabe. The appellant sought to prove that a marriage ceremony was celebrated between said Hildebrand August VonGlahn and said Martha McCabe at St. Andrew's catholic church in New York, in May, 1850, and that she was the only issue of that marriage. A book purporting to contain the records of marriages celebrated in said St. Andrew's catholic church from April 15, 1842, to November 1, 1851, was offered in evidence, on one of the pages whereof appeared what purported to be the record of the celebration of the marriage of one August VonGlahn and Martha McCabe by Father Michael Curran, the pastor or rector of said church, on the 20th or 23d day of May, 1850.

The court refused to receive the book in evidence. It is not contended that any other competent or sufficient evidence of a ceremonial marriage between the parties was produced, but it is urged that the court erred in refusing to admit the church record in evidence.

The laws of the State of New York in force at the time of the alleged entries in the record of the church did not require that pastors of churches should keep a record of marriages celebrated by them, nor did such laws authorize the introduction in evidence of such records as a means of proving a marriage. Father Curran had departed this life long prior to the hearing of the cause. It seems to have been the view of the trial judge that in cases where, as here, the pastor who it is alleged had made the entries in the record of the church was not living, it was essential to the admissibility of the record in evidence that it should be shown that the record was in the handwriting of such pastor. Evidence was heard upon that question, and the court held it was not proven that the entry in question was in the handwriting of the rector, Father Curran. Without being understood as ruling at all on the question whether the church records would have been admissible in any event, it is quite clear from all authorities upon the question that it is requisite to the admission of such records that it shall be made to appear that the entries were made by the person whose duty it was to make them. (1 Greenleaf on Evidence, sec. 485; *Kennedy v. Doyle*, 10 Allen, 161.) We concur in the conclusion reached by the trial judge that the evidence did not justify the view that the entry in question in the church record was in the handwriting of the pastor, Father Curran.

A photograph of the page of the church record on which were the entries of marriages from May 17 to June 13, 1850, both inclusive, has been incorporated in the record for our inspection. The entries of twelve marriages conceded to be in the handwriting of Father Curran appear on the page in addition to the entry in dispute. Three witnesses, experts

in handwriting, testified that in their opinion the body of the disputed entry was not in the handwriting of Father Curran. Documents conceded to be in the handwriting of appellant were without objection submitted to the inspection of the experts, and all expressed the opinion that the body of the disputed entry was in the handwriting of appellant. It was the opinion of the expert witnesses that the entry in dispute had been written on the page many years after the other entries thereon. Two of the expert witnesses testified that an ingredient used in compounding the ink with which the disputed entry was written was not in use in making ink in 1850, when that entry purported to have been made, and that such ingredient was not used in making inks until 1890,—about forty years after the purported time of the entry. We have examined the photographic page of the record. The writing in the disputed entry is so plainly different from that of the other entries made by Father Curran as to attract the attention at but a casual glance. The difficulty in comparing the writing of the disputed and the other entries is not to detect points of difference, but to find any points of resemblance. The entry in dispute is near the center of the page and in a space that, if it is a forgery, must have been left unfilled by Father Curran. Counsel for appellant urges this fact as strongly indicating that the entry was regularly made and is not a forgery. A close inspection deprives this suggestion of all of its force. On the margin at the left side of the space on the page there appears in writing the date "20" and the words "hurried off." These figures and words are in the same handwriting as all of the other entries made by Father Curran. A figure "3" has been written over the "o" in the date, leaving the "o" however still plainly discernible. We have no doubt from the appearance of the page that on the 20th day of May, 1850, Father Curran began to make an entry of a marriage on the page where the disputed entry now appears, but that the parties "hurried off" without having the ceremony completed, or they were or he was "hurried off" be-

fore he had time to complete the record. He therefore wrote the words "hurried off" just below the date "20," and thus it was; no doubt, that the blank space was left between the entries on the page. That the entry was written in this blank space by some other person than Father Curran does not admit of any doubt.

We concur in the view reached by the learned trial judge that the other proof in the record is not sufficient to justify the conclusion that Hildebrand August VonGlahn and Martha McCabe bore the relation of husband and wife. We find testimony in the record tending to prove, and other testimony tending to disprove, the fact of such marriage by general reputation. The repute of marriage was based almost wholly on alleged statements of Hildebrand August VonGlahn. The testimony of appellant tended to show cohabitation matrimonial in character in 1863. She was then of the age of seven years. That said VonGlahn had had sexual intercourse with the mother of the appellant in New York City and believed that the appellant was the fruit of such intercourse is well established from his statements. The appellant came to Chicago, where he lived, when she was about fourteen years of age and he gave her money, and after she returned to New York he caused her to be educated at his expense and provided for her until his death. She visited him in Chicago during her vacations, and there is much force in the suggestion of counsel that his statements made to friends in Chicago, relied upon to prove his marriage with her mother, were made to shield the appellant from the imputation of illegitimacy. In his will he bequeathed to her the income for life accruing on a fund of \$10,000, the principal whereof he directed should be paid "to her children lawfully begotten." In this bequest the appellant is expressly described by the testator as "Anna, daughter of Martha McCabe, who claims said Anna to be my child." The declarations of the father, in his will, as to the legitimacy of his child impress us as the better guide to the real truth of the

matter than the oral statements made by him, as testified to by the witnesses. The declarations in the will are inconsistent with the existence of the marriage relation of the testator and Martha McCabe. The conduct of said VonGlahn was also inconsistent with the existence of such marriage relation, unless the presumption be indulged that he willfully committed bigamy. On the 8th day of August, 1863, while, as he then knew, said Martha McCabe was still living, he entered into the marriage relation with Matilda Busse in Chicago, and such marriage was celebrated by ceremonials and lawful forms. The issue of that marriage was one son, who is still living. Said VonGlahn lived in the city of Chicago during the remainder of his lifetime.. His death occurred on the 5th day of April, 1874. We are not to presume that he was guilty of bigamy, but the presumption is in favor of his innocence and of the legality of the marriage which was formally solemnized. (19 Am. & Eng. Ency. of Law, —2d ed.—p. 1206.) Martha McCabe survived VonGlahn more than twelve years. She lived during the last five or six years of her lifetime in Chicago, but did not seek to enforce any right, as widow, against his estate, though he was the owner of valuable property at the time of his death. Nor is it shown that she ever, at any time during her lifetime, attempted to assert any legal right under the marriage relation. The presumptions of a prior marriage with Martha McCabe are too weak to be allowed to operate to render void the duly solemnized marriage between Hildebrand August VonGlahn and Matilda Busse.

The order and judgment of the county court are affirmed.

Judgment affirmed.

ANDREW IRWIN *et al.*

v.

ANDREW SAMPLE.

Opinion filed December 22, 1904.

1. EQUITY—*deed acquired by abuse of fiduciary relation will be set aside.* A deed from the grantor to the brothers of his deceased wife, obtained from him by a betrayal of the confidence reposed in them by reason of their intimate business and family relations and at a time when he was in an extremely low mental and physical state, will be set aside in equity.

2. JUDGMENTS AND DECREES—*when it is error to order an administrator to turn over assets.* Where a bill to cancel a deed to the defendants, one of whom is administrator of the estate of complainant's wife, and require them to return the personal property of the wife's estate, does not seek to affect the status of the administrator, it is error, on decreeing cancellation of the deed, to require the personal assets to be turned over to complainant.

WRIT OF ERROR to the Circuit Court of Logan county;
the Hon. GEORGE W. PATTON, Judge, presiding.

This was a proceeding in chancery, brought in the circuit court of Logan county, by Andrew Sample, the defendant in error, against Andrew Irwin and other heirs-at-law of Lydia Jane Sample, deceased, plaintiffs in error, to set aside a deed to eighty-five acres of land made by said Andrew Sample to William J. Irwin, Andrew Irwin, Robert Irwin and George C. Irwin, hereinafter, for the sake of brevity, referred to as the four Irwin brothers, and for a partition of said land among the parties hereto; also for the return of certain personal property, aggregating \$5000 in value, which was left by Lydia Jane Sample, deceased, and which had been delivered by Andrew Sample to Robert Irwin after the death of Lydia Jane Sample. A decree was entered granting the relief prayed for in the bill, and this writ of error is prosecuted by the defendants below to reverse that decree.

The bill represents that Lydia Jane Sample died on January 22, 1902, intestate, leaving her surviving Andrew Sample, the complainant, her husband, the four Irwin brothers and John Irwin, her brothers, and Lydia Jane Watson, the only daughter of a deceased sister, as her only heirs-at-law; that the four Irwin brothers were all residents of Logan county; that John Irwin and the niece were residents of Ireland; that she left personal property of the value of \$6000 and eighty-five acres of land in Logan county; that Lydia Jane Sample, for a number of years prior to her death, was an invalid, and for five years immediately preceding her death required the greater part of complainant's time in caring for her; that by reason thereof his health became affected, and the death of his wife was a severe shock to him mentally and physically, and incapacitated him for some time from intelligently transacting business of any kind; that on the day after his wife's funeral, which occurred on Friday, the Irwin brothers, whose relations with complainant and deceased had been and were of the most cordial and confidential character, came to complainant's residence and represented to him that under the law they owned all the personal property left by deceased, and demanded the same of him, stating that complainant would be protected in all his rights in the property; that he thereupon turned over to them all of said personal property; that on Monday, two days later, William J. Irwin came to complainant's house with a notary public named Houser, and represented that it was necessary to administer upon the estate of his wife, and that the four Irwin brothers under the law had certain rights in the land left by deceased and also in a certain tract of land owned by complainant, and that the interest of the Irwin brothers in complainant's land was equal to the interest of complainant in the real estate left by the deceased; that thereupon William J. Irwin proposed to complainant that the Irwin brothers would quit-claim all their interest in the land owned by complainant if he would quit-claim to them

all his interest in the real estate left by deceased; that William J. Irwin also represented that an attorney named Foley, who had been the legal adviser of complainant in all his legal business, had instructed him to say to complainant that he, Foley, was attending to complainant's interests in the estate, and that Foley had prepared a paper, which William J. Irwin then submitted to complainant for him to sign, and represented that Foley had sent word that it was necessary for him to execute it in order to secure to him his rights in his wife's property and to settle the estate; that without knowing the contents or legal effect of the document, complainant signed it; that thereafter the Irwin brothers executed and delivered to the recorder of deeds of Logan county a quitclaim deed to complainant for the land already owned by him and had it recorded, after which it was mailed to him by the recorder. The bill further avers that complainant has partially recovered from his mental and physical prostration and has learned that the instrument he signed was a quitclaim deed to the real estate and a release and conveyance of the personal property left by his wife and a relinquishment of his right to administer upon his wife's estate. The bill charges that all the representations made by William J. Irwin were false and untrue and were deliberately made in pursuance of a conspiracy among the Irwin brothers to cheat, defraud and swindle complainant out of his legal rights and interest in his wife's estate, and that the conveyance executed by complainant was without any consideration. The interests of the parties in the real estate left by deceased are set out, and the bill contains a prayer that the conveyance executed by complainant and delivered to the four Irwin brothers be set aside and the land partitioned, and that defendants be ordered to return the personal property to complainant.

Two amendments were made to the bill. The first of these avers that complainant was ignorant of his right to administer upon the estate, and requested Robert Irwin to take charge of the personal property and to consult with

Foley as to what was necessary to be done in the administration of the estate; that Robert Irwin did see Foley, but falsely and fraudulently represented to him that complainant had given to the Irwin brothers his interest in the real and personal property left by deceased and desired to transfer such property to them, and that thereupon Foley prepared the document which complainant signed; that William J. Irwin came to complainant's house and represented that Robert Irwin had consulted with Foley in regard to the administration of the estate and that Foley was acting as the complainant's attorney in the matter and had sent word for complainant to sign the paper, which he did on account of the said representations, being ignorant of his rights in the property.

By the second amendment it is averred that when William J. Irwin came to complainant's house and obtained his signature to the instrument, complainant was taken by surprise, and had no opportunity to advise with friends or counsel with an attorney. It is charged that a confidential and fiduciary relation existed between complainant and the Irwin brothers which was abused in procuring complainant to make the conveyance of his interests in his wife's estate.

All of the defendants joined in an answer specifically denying the material allegations of the bill. The complainant filed a replication to the answer. An answer was filed to the bill, as amended, by the four Irwin brothers alone. The specific averments of the answers aside from the denials, so far as material, are hereinafter set out in the opinion of the court. The cause was referred to the master to take the evidence. Upon the coming in of the master's report, the decree was entered finding the facts substantially as set out in the amended bill.

The material averments of the bill find support in the proof offered by complainant, while the evidence adduced by defendants below tended to show that an eighty-acre tract of land, on which the Samples lived at the time of the death

of the wife, the title to which is in the husband, had been purchased in part with his funds and in part with moneys realized by him from conducting farming operations in his own name upon the farm owned by the wife which is involved in this suit; that she in her lifetime and the four Irwin brothers upon her death claimed an interest in the tract held by the husband; that the wife had exacted from the husband a promise that in the event of her death her property, held in her name, should go to her brothers and niece, provided they released to him their interest in the tract which stood in his name, and that the conveyances mentioned in the bill were made for the purpose of carrying out that arrangement. Andrew Sample denies that any such arrangement was made with him by his wife, and denies that she ever claimed any title or interest in his land.

Plaintiffs in error insist that the decree is against the manifest preponderance of the evidence, and that the court erred in ordering Robert Irwin to turn over to the complainant personal property which he held as administrator.

BLINN & HARRIS, HOBLIT & SMITH, and BEACH, HODNETT & TRAPP, for plaintiffs in error.

BALDWIN & STRINGER, and KING & MILLER, for defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

The evidence warrants the conclusion that the relation between Andrew Sample and the four Irwin brothers was fiduciary in its character at the time of the transaction under investigation in this cause. They were his brothers-in-law and lived in the same neighborhood with him and had been frequently at his home, especially during the long illness of his wife immediately preceding her death. George Irwin lived within a quarter of a mile of Andrew Sample, and had assisted him in the transaction of his business. The

relations between them and him were exceedingly cordial and intimate, and the trust and confidence reposed by him in them was such that he regarded his property or his interests as being entirely safe in their hands. Immediately following his wife's death, he was in a condition of great prostration, both physically and mentally, and while not disqualified to transact business affairs of an ordinary character, was yet, on account of the weakness of his intellect, consequent upon his great exhaustion, unfit to care for his own rights in dealing with persons desirous of furthering their own interests at his expense.

Mrs. Sample died on Wednesday, the 22d day of January, 1902. On the day following, the four brothers were at the Sample home, where there was some discussion among them as to who should administer upon the estate of the deceased. The funeral occurred on Friday, and on that day Andrew Sample requested them to return on Saturday, and at that time it was agreed that Robert Irwin should act as administrator. Sample then delivered to Robert the personal property of the estate, and as the brothers were leaving adjured them to treat him "right in this thing;" and he says they assured him that they would do so, and his testimony in that regard is not denied.

On the succeeding Monday, William J. Irwin came to Sample's home, accompanied by an attorney, Paul Houser, who was also a notary public. William's purpose was to secure Sample's signature to a conveyance which transferred to the four Irwin brothers his interest in the real estate of the deceased, which also recited that he thereby transferred his interest in his wife's personal property to the grantees in the deed, and waived his right to administer her estate. The four Irwin brothers contended that they had some interest in the eighty acres of land which stood in the name of Andrew Sample, and they proposed to quit-claim that to him as a consideration for the execution of the instrument above mentioned which was to be signed by him. Sample had in the

past occasionally employed Stephen A. Foley, an attorney residing at Lincoln, in Logan county, in whom he had great confidence, and he had suggested to Robert that he take Mr. Foley's advice about the manner of administering the estate. According to the testimony of Paul Houser, William J. Irwin secured Sample's signature to this instrument by stating that he had brought it there to be signed according to Mr. Foley's instructions, and that in accordance with its terms, Robert Irwin was to be appointed administrator. Mr. Houser says, however, that he does not remember the exact words that William used. Sample states that Irwin further said to him on that occasion that "Mr. Foley sent out word to me that he was tending to my business and everything would be done right." Mr. Foley testified that he was not acting as Sample's attorney, that he did not send any such message by William J. Irwin, and that he did not send any instruction to Sample in reference to signing the instrument in question. The deed from the four Irwin brothers to Sample had then been signed by three of the grantors named therein, and Sample was assured by William that it would be signed by the remaining grantor. Under these circumstances, relying, as he says, upon the pretended message conveyed to him from Mr. Foley, Sample signed and acknowledged the instrument which had been prepared for his signature. The notary's presence, on that occasion, was secured by William so that Sample's acknowledgment might be taken. Mr. Houser did not know the purpose of the visit until after they were in the house. He testifies that Sample was in a dazed and stupid condition, and that he was not fully satisfied that Sample understood what he was doing when he executed the conveyance.

In our judgment, the evidence warrants the finding that the execution of this instrument was induced by the unfounded claim which the four Irwin brothers set up to the eighty acres of land owned by Andrew Sample, and by the false statements made to him by William J. Irwin in ref-

erence to the message sent by Mr. Foley to Sample. His confidence and trust in these four brothers-in-law and his weakened mentality contributed to make him the victim of their wrongdoing.

The following, from section 947, volume 2, of Pomeroy on Equity Jurisprudence, has several times received the approval of this court: "The term fiduciary or confidential relation, as used in this connection, is a very broad one. It has been said that it exists, and that relief is granted, in all cases in which influence has been acquired and abused,—in which confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another. The only question is, does such a relation in fact exist?" Likewise, language from section 956 of the same volume, which reads: "It is settled by an overwhelming weight of authority, that the principle extends to every possible case in which a fiduciary relation exists in fact, in which there is confidence reposed on one side, and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal; it may be moral, social, domestic or merely personal." (*Roby v. Colehour*, 135 Ill. 300; *Thomas v. Whitney*, 186 id. 225; *Walker v. Shepard*, 210 id. 100.) The court below properly applied this principle to the transaction involved in this proceeding.

We are not unmindful of the testimony of the four Irwin brothers and of the son and daughter of William J. Irwin, that at the time of the meeting at the Sample home on the Saturday after the funeral, Andrew Sample stated that in accordance with the request of his wife, he desired to transfer to her five brothers and her niece, the daughter of the deceased sister, being all her heirs other than himself, the property owned by her and held in her name at the time of her death in exchange for a deed from them conveying to

him all their interest in the eighty acres which had been conveyed to him. We are disposed to the view that this contention is an afterthought on the part of the four Irwin brothers. The original answer of defendants stated that the instrument executed by Andrew Sample was upon a "good and sufficient and valuable and ample consideration for the said acts and conveyances and for each of them; and that said transaction was and is an honest, open and fair business transaction between man and man." This averment is wholly without support in the evidence. On the contrary, there is no basis in the proof for any conclusion that there was any consideration whatever for the conveyance of about \$10,000 worth of property by Sample, except the execution of a quit-claim deed to him, which conveyed nothing. On the 21st of December, 1903, after the trial of the cause and on the same day that the final decree was entered, in their answer, filed on that day, to the amended bill, the four Irwin brothers state that the instrument in question "was signed by complainant of his own free will, and understanding the legal effect of said deed, signed the same for the purpose of carrying into effect the previous arrangement and understanding by which he had agreed to carry into effect the request of his wife, and relinquish all right, title and interest in the personal property and real estate held by her to her brothers and niece living in Ireland." This defense had not been theretofore disclosed by answer.

The conveyance which the bill seeks to set aside transferred the property to the four Irwin brothers alone. When they took that deed, had they been attempting to carry out any such arrangement as they testify existed and as they set up by this answer to the amended bill, the instrument taken should have provided in some way for passing one-sixth of this property to John Irwin and a like portion to Lydia Jane Watson, the brother and niece residing in Ireland; so that, in any event, the conveyance taken did not carry out the arrangement which the grantees therein swear it was made

to effectuate, and the instrument which they themselves had prepared and executed indicates that their testimony is untrue and their defense without merit.

If, however, the preponderance of the evidence showed Andrew Sample's purpose to be that stated by these grantees, we think it should be attributed to the unfounded claim set up by them to an interest in the real estate owned by him, and the fact that the same claim may have been made by his wife in her lifetime does not lend it sanctity and does not better their standing in a court of equity. So far as disclosed by this record, it was without merit, whether asserted by her or by them. The most that the evidence tends to prove in this regard is that at one time he owed her for a part of the money invested in his land. There is no contention that she ever owned any interest of any character in the land purchased by him. Under such circumstances, in view of the relations existing between the parties, it is manifest that the conveyance should not stand.

The decree of the court below, however, is erroneous in one respect. Robert Irwin is administrator of the estate of the deceased and is now in possession of the personal property left by her. The decree orders that he surrender to Sample all the personal property received by him belonging to her estate. The bill does not seek to affect his status as administrator. The conveyance made by Andrew Sample was properly canceled and set aside, but it was not proper to direct the administrator to turn over the personal assets to defendant in error. The conveyance being for naught held and esteemed, if Robert Irwin shall continue to act as administrator until the estate is finally closed, it will be his duty at that time to pay and deliver to Andrew Sample, as heir of his deceased wife, all the personal assets of the estate. Should he be removed as such administrator and another appointed in his stead, then these assets should be surrendered to his successor.

The decree of the circuit court, in so far as it directs Robert Irwin to account for and pay over to Andrew Sample the personal assets at this time, is reversed. In all other respects it is affirmed.

The costs of this court will be adjudged, one-half against plaintiffs in error and one-half against defendant in error.

Defendant in error has filed an additional abstract of the record and moves that the expense thereof be taxed as costs. We think the necessity for the additional abstract appears, and the motion will be allowed.

Decree affirmed in part and reversed in part.

CHICAGO AND MILWAUKEE ELECTRIC RAILWAY COMPANY

v.

PAULA F. ULLRICH.

Opinion filed December 22, 1904.

1. INSTRUCTIONS—*effect of the Supreme Court's approval of an instruction.* A decision of the Supreme Court approving an instruction must be regarded only as deciding that the instruction is not subject to the objections urged against it in the particular case.

2. DAMAGES—*plaintiff in a personal injury case may recover future damages.* An action for personal injury being for a single wrong, the plaintiff is entitled to recover all damages, present or prospective, which necessarily result from the injury; and a part of such damages are future pain and suffering and inability to labor.

3. SAME—*evidence must show that future damages are reasonably certain to result.* An assessment of prospective damages in a personal injury case must be based upon evidence showing that it is reasonably certain the plaintiff will suffer such damages, and the nature and extent thereof.

4. INSTRUCTIONS—*when instruction as to future damages is not objectionable.* An instruction allowing the jury to give the plaintiff damages for "such future suffering and loss of health, if any, as the jury may believe, from the evidence before them in this case," she will sustain by reason of such injuries, is not objectionable as allowing the jury to consider speculative damages.

5. TRIAL—*when question of future damages is properly left to the jury.* If the evidence in a personal injury case shows that the plaintiff has not recovered from her injuries, the question of how long and to what extent she will suffer in the future is a question necessarily left to the jury, to be determined from the evidence.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. JOHN L. HEALY, Judge, presiding.

FAYETTE S. MUNRO, (M. F. GALLAGHER, of counsel,) for appellant.

JAMES J. BARBOUR, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The Appellate Court for the First District affirmed a judgment recovered by appellee in the circuit court of Cook county against appellant for damages on account of personal injuries received in a collision between two cars of appellant, in one of which she was riding as a passenger.

The only error alleged by counsel is the giving to the jury of the following instruction at the request of plaintiff:

"The court instructs the jury that if you find for the plaintiff you will be required to determine the amount of her damages. In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to, and they should, take into consideration all the facts and circumstances as proven by the evidence before them; the nature and extent of plaintiff's physical injuries and resulting from the street car collision in question, if any, so far as the same are shown by the evidence; her suffering in body and mind, if any, resulting from such physical injuries, and such future suffering and loss of health, if any, as the jury may believe, from the evidence before them in this case, she has sustained or will sustain by reason of such inju-

ries; her loss of time and inability to work, if any, on account of such injuries; and may find for her such sum as in the judgment of the jury, under the evidence and instructions of the court in this case, will be a fair compensation for the injuries she has sustained or will sustain, if any, so far as such damages and injuries, if any, are claimed and alleged in the declaration."

The objections to the instruction are, first, that it did not correctly state the law as to future damages; second, that it was improper to give it because there was no evidence upon which to base it.

It is acknowledged that future damages may properly be assessed where the evidence shows that they are reasonably certain to result from the injury. The action being for a single wrong, the plaintiff is entitled to recover all damages, present or prospective, which necessarily result from the injury, and a part of such damages are future pain and suffering and inability to labor. The evidence must show that it is reasonably certain the plaintiff will suffer such damages and the nature and extent thereof, and the assessment of damages must be based upon such evidence. The first objection to the instruction is, that it did not limit the jury to such future damages as the evidence showed were reasonably certain to result from the accident, but permitted them to speculate as to such damages and to consider merely possible or probable damages. The reply of counsel for appellee to this argument is, that the court has repeatedly approved of this instruction as a correct statement of the law. It is true that substantially the same instruction has been before the court in different cases where various objections to it were considered, but the particular objection now presented has not heretofore been made. Objections not made and questions not raised are not considered, and each decision must be regarded only as deciding the question presented for decision. We do not think, however, that the instruction is subject to the objection now made. A plaintiff cannot recover

damages for future suffering which is not reasonably certain to result from his injury. (13 Cyc. 138-144.) A mere possibility, or even a reasonable probability, that future pain or suffering may be caused by the injury, or that some disability will result therefrom, is not sufficient to warrant an assessment of damages. But we do not understand that this instruction authorized the jury to allow such damages. The damages are to be such as the jury believe, from the evidence, the plaintiff will sustain,—not such as are possible or probable. If the evidence shows that the plaintiff will sustain damages in the future they may properly be allowed, and that is the purport of the instruction.

The second objection is, that there was no evidence that it was reasonably certain that the plaintiff would suffer in the future in mind or body. The evidence was conclusive that at the time of the trial she had not recovered from her injuries, and it necessarily followed that there would be future damages to some extent. The only debatable question was as to how long and to what extent she would suffer in the future, and that question was necessarily left to the jury to be determined from the evidence. There was evidence on which to base the instruction, and the case was not like that of *Illinois Iron and Metal Co. v. Weber*, 196 Ill. 526, where the jury were authorized, by an instruction, to speculate on the possibility of damages being suffered six years after the trial, without any evidence that such a result was even probable.

Appellee's counsel asks us to award damages to her on the ground that the appeal was taken merely for delay. A similar motion was made and denied in the Appellate Court, and we are not satisfied that the purpose of the appeal was delay. The motion is therefore denied.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

THE ILLINOIS CENTRAL RAILROAD COMPANY

v.

THE PEOPLE *ex rel.* D. F. Brown, County Treasurer.*Opinion filed December 22, 1904.*

1. TAXES—*highway commissioners' certificate need not specify amount required for each purpose.* Section 119 of the Road and Bridge act does not require that the certificate of the highway commissioners for a road and bridge tax levy shall state the specific amount required for each of the purposes named. (*C., I. & W. Ry. Co. v. People*, 212 Ill. 518, followed.)

2. SAME—*when levy for town tax cannot be validated by amendment.* If the statute authorizing the levy of a town tax has not, in fact, been complied with, the levy cannot be made valid by allowing amendments of certificates or proceedings upon an application for a judgment of sale.

APPEAL from the County Court of Montgomery county; the Hon. M. L. McMURRAY, Judge, presiding.

JETT & KINDER, (JOHN G. DRENNAN, of counsel,) for appellant.

H. J. HAMLIN, Attorney General, and L. V. HILL, State's Attorney, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

On the application of the county collector of Montgomery county for a judgment of sale for delinquent taxes the appellant filed its objections to the road and bridge tax of North Litchfield township and of South Litchfield township, and to the town tax of North Litchfield township, all in said county. The objection to the road and bridge tax was, that the certificates of the town authorities in each of said townships "failed to specify the amount required for each particular purpose as well as the total amount, and that where the total amount is given the particular purpose is not given, and *vice versa*." The objection to the town tax was, that

the certificate of the town authorities shows a gross sum for "town purposes or town expenses," without designating the particular purposes for which the same, when collected, were to be used. The objections were overruled and judgment entered against the property of the objector, from which an appeal has been prayed to this court.

The certificate of levy for North Litchfield township is, in substance, that the commissioners of highways will require \$2600 to be raised by taxes on the real estate, personal and railroad property in the town for the purposes as provided in the statute, said amount being a levy of forty per cent on each \$100 valuation according to the assessment of said town for the current year. The certificate also states that at the annual town meeting held on the 7th of April, 1903, an additional levy of twenty per cent was ordered by the legal voters present at said meeting for the aforesaid purpose. The certificate of the commissioners of highways of South Litchfield township is that they require the sum of \$1900, and is in substantially the same language as that of North Litchfield township. These certificates were properly signed by the commissioners but the purposes for which the tax was required were not itemized therein.

Section 119 of chapter 121 of our statutes provides that the highway commissioners of each township shall annually ascertain, as near as practicable, how much money must be raised for the making and repairing of bridges, payment of damages by reason of opening, altering and laying out new roads and ditches, the purchase of necessary tools, implements and machinery for working roads, the purchase of necessary material for building and repairing or draining roads and bridges, the pay of the overseer of highways during the ensuing year and for the payment of all outstanding orders drawn by the commissioners on their treasurer, which tax shall be extended on the tax book according to the assessment of the current year, and shall levy a tax on all the real, personal and railroad property in said town, not ex-

ceeding forty cents on each \$100; and they shall give to the supervisor of the township a statement of the amount necessary to be raised and the rate per cent of taxation, signed by said commissioners or a majority thereof. Both of said certificates literally comply with this requirement of the statute. They state the amount of money to be raised, the purposes for which it is required and the rate per cent of taxation. The statute does not require the certificate to state the amount required for each purpose. The language in *Cincinnati, Indianapolis and Western Railway Co. v. People*, 207 Ill. 566, to the contrary must be treated as inadvertently used and overruled in *Cincinnati, Indianapolis and Western Railway Co. v. People*, 212 Ill. 518. The objection to the road and bridge tax was properly overruled.

The levy filed by the town clerk was as follows: "I, Joseph Lawrence, town clerk of said town, do hereby certify that the total amount of taxes required to be raised in said township for all purposes for the year 1903 is \$800." It seems to have been conceded that the objection to this levy was good. (*People v. Indiana, Illinois and Iowa Railroad Co.* 206 Ill. 612; *Cincinnati, Indianapolis and Western Railway Co. v. People*, 207 id. 566.) Upon the hearing the town clerk, over the objections of appellant, was allowed to testify as follows: "I am a citizen of North Litchfield township, and was present, I apprehend, when this levy for which this certificate of levy was made. I suppose the purpose of this \$800 mentioned in the certificate of levy was made for current expenses of the township. I was present at the town meeting when this levy was made. I am not positive of the purpose for which this levy was made. It was made for expense account, I understand. They were bills that had been audited before they were allowed, and this levy was to pay these bills." Upon this evidence the court permitted the levy to be amended by adding the words, "for bills that have before that time been audited against the township and for the current expenses for the said township." These words were

added immediately after the figures "\$800," at the end of the certificate. It is insisted that the court erred in admitting the testimony of the town clerk and allowing said amendment to be made.

We held in *Chicago and Northwestern Railway Co. v. People*, 200 Ill. 141, following our previous decisions there cited (p. 145): "Where the power to levy a tax is conferred by law and is regularly exercised by the proper authorities in substantial conformity to the law, the court, upon proof of such fact, may permit the certificate of the levy to be amended on the hearing by changing the official designation of the officers, allowing the individual signatures to be substituted for the corporate name and correcting other like formal errors. (*Spring Valley Coal Co. v. People*, 157 Ill. 543; *Chicago and Alton Railroad Co. v. People*, 171 id. 544; *Chicago and Northwestern Railway Co. v. People*, 183 id. 247.) But if the statute authorizing the levy of the tax has not, in fact, been followed and complied with, the levy can not be made valid by amendments of certificates or proceedings, because that would not be a correction of a mere irregularity but would be an attempt to make valid a levy at the time of the amendment. (*People v. Smith*, 149 Ill. 549; *Chicago and Northwestern Railroad Co. v. People*, 184 id. 240.) There must be a valid levy which is defective in matters merely formal, to authorize an amendment." The levy in the present case as originally made was not sufficient, under the statute, for the reason that it did not specify the particular items for which it was made but certified the amount in a single sum. The evidence upon which the amendment was permitted, if it had been competent, (which it was not,) was insufficient to authorize the amendment. (*Cincinnati, Indianapolis and Western Railway Co. v. People*, and *People v. Indiana, Illinois and Iowa Railroad Co. supra.*) The town clerk was very uncertain as to whether he was present when the levy was made and wholly indefinite in his recollection as to the purposes for which the gross sum was

to be expended. He did not pretend to state that the voters at the town meeting intended to levy the tax for specific purposes. The objection to the town tax should have been sustained.

The judgment of the county court will be reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

WILLIAM E. MORTIMER *et al.*

v.

EDWIN A. POTTER, Receiver.

Opinion filed December 22, 1904.

1. **WILLS**—*language construed as not passing the title to bank stock.* A clause in a will directing the trustees of all the testator's property "to pay unto my said wife, from the time of my decease as long as she shall live, an annuity of \$2000 a year, and also all dividends that may be declared during the time last mentioned" on certain bank stock, does not pass the title in the bank stock to the wife, but merely the right to the dividends during her life.

2. **TRUSTS**—*when an estate is liable for assessment on national bank stock.* Where a trustee distributes the trust estate, consisting, in part, of stock in an insolvent national bank, leaving unpaid an assessment previously ordered by the comptroller under the authority of the Federal statute, each distributee receiving more than the amount of the assessment, the trustee and the distributees are each liable, in equity, for the assessment.

3. **LIMITATIONS**—*statute limiting filing of claims against estate does not bar assessment on national bank stock.* The remedy provided by the Federal statute authorizing the levy of an assessment against the estate of the holder of stock in an insolvent national bank may be enforced as long as the assets can be reached, regardless of the expiration of the statutory period for filing claims against the estate.

4. **EQUITY**—*objection of adequate remedy at law must be raised below.* Objection of adequate remedy at law will not be considered on appeal when not raised below by demurrer or answer to the bill.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JESSE HOLDOM, Judge, presiding.

KERR & KERR, for appellants.

ELMER H. ADAMS, (EDMUND W. FROEHLICH, of counsel,) for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court :

Appellee filed a bill in the superior court of Cook county against appellants to collect an assessment upon ten shares of the capital stock of the National Bank of Illinois, owned by Charles Kavanagh, deceased. On answer filed, and replication thereto, the cause was heard on an agreed statement of facts and the bill dismissed for want of equity. The receiver appealed to the Appellate Court for the First District, which reversed the decree of the superior court and remanded the cause, with directions. To reverse that judgment the defendants below have perfected this appeal.

It appears from the stipulation of the parties that on and prior to April 1, 1873, Charles Kavanagh owned ten shares of the capital stock of the National Bank of Illinois, of the par value of \$100 each. He died on that date, leaving a will afterward probated, and his estate was administered upon and settled in due course of administration about two years after his death. By the provisions of his will he created a trust vesting all of his property in two trustees, William E. Mortimer and his widow, Lydia Kavanagh, which trust was to continue for and during the lifetime of his wife. The third clause of the will is as follows: "To pay unto my said wife, from the time of my decease as long as she shall live, an annuity of \$2000 a year, and also all dividends that may be declared during the time last mentioned upon the ten shares of stock in the National Bank of Illinois now owned by me." He also directed by his will that there should be paid to such person or persons as his wife by her will should

name and appoint, the sum of \$10,000. After other bequests, the Chicago Home for the Friendless, the Chicago Relief and Aid Society and the Chicago Christian Union were made residuary legatees. On December 21, 1896, the National Bank of Illinois failed and a receiver was duly appointed for it, to which receivership appellee afterwards succeeded. On March 14, 1899, the comptroller of the currency ordered that an assessment of one hundred per cent of the capital stock of said bank be levied, to become payable April 14 of that year. On August 24 of the same year, 1899, the widow, Lydia Kavanagh, died testate, having nominated Mary E. Holden as her appointee under the power in her husband's will, to receive the \$10,000, and whom she also nominated as her executrix and sole legatee and devisee. Her will was duly admitted to probate soon after her death, and the estate was declared settled in due course of administration on June 10, 1902. During the administration the National Bank of Illinois filed no claim against her estate. After her death and after the order had been made by the comptroller of the currency levying said assessment, Mortimer, the sole surviving trustee, distributed the remaining assets of the estate of Charles Kavanagh in his hands according to the provisions of the said last will and testament of Charles Kavanagh, paying to each of the residuary legatees the sum of \$1500. The assessment upon the capital stock remaining unpaid, with no funds in the hands of the trustee with which to pay the same, this bill was filed. By their answer the defendants, among other things, set up that by the acceptance of the widow under the third clause of her husband's will, the capital stock in question was segregated from the general body of his estate, whereby she alone became liable for the assessments thereon. By the judgment of the Appellate Court remanding the cause the superior court was directed to enter a decree for the complainant for \$1000, with interest from April 14, 1899, against all of the defendants,—primarily against the trustee as such, secondarily against the legatees

and distributees, ultimately against the trustee personally.

It is argued on behalf of appellants that the ten shares of stock by the will of Charles Kavanagh accepted by his widow became the property of Lydia Kavanagh and ceased to belong to his estate, hence this proceeding cannot be maintained. If the position is tenable other questions in the case become unimportant. We will therefore consider it first.

The determination of the question must turn upon the construction to be given to the third clause of the will of Charles Kavanagh. Did the testator thereby intend to give his wife the stock? He gave all of his estate to trustees for certain expressed purposes. They were to pay his wife all dividends that might be declared "*during the time last mentioned upon the ten shares of stock,*" etc. By this language the wife is not even given the custody or control of the stock itself, much less the power or right to dispose of it as her own. She was simply entitled to receive the dividends declared upon it, during her lifetime. It seems to us too clear for argument that the testator did not intend to give her the stock. We do not agree with counsel for appellants that Mrs. Kavanagh had a life estate in the stock. The title to the same was in the trustees or executors of the estate of Charles Kavanagh. It is perfectly clear from the evidence that she never claimed the stock, nor was it dealt with, either by her or her co-trustee, William E. Mortimer, as other than the property of the estate of Charles Kavanagh, deceased, the dividends being receipted for on the bank's books at all times in that way. From 1884 until the bank ceased to pay dividends, in 1896, checks were drawn for the dividends, payable to Charles Kavanagh and endorsed "Lydia Kavanagh, trustee for the estate of Charles Kavanagh, deceased." We think that the Appellate Court properly held that the shares of stock belonged to the estate of Charles Kavanagh, deceased, and not to his widow, Lydia Kavanagh.

The appellant Mortimer, after he knew that the assessment had been ordered, divided the remaining estate in his

hands among appellants, as above stated. Section 5151 of the Federal statute, under which the liability here sued for is established, is in the following language: "The shareholders of every national bank shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and acknowledgments of such association to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares." Section 5152 of the same statute is as follows: "Persons holding stock as executors, administrators, guardians or trustees shall not be personally subject to any liabilities as stockholders, but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such trust funds would be if living and competent to act and hold the stock in his own name." Under these sections the executors or trustees were liable for this assessment the same as Kavanagh would have been if living, and in view of the fact that Mortimer had distributed the estate leaving the claim unpaid, and each devisee had received more than the amount of the entire assessment, they are each liable therefor in equity.

It is next insisted by appellants that even though this claim is valid against the estate, yet it cannot be enforced because it is barred by the Statute of Limitations, not having been presented for probate against the estate of Kavanagh within two years after the granting of testamentary letters. The claim against his estate is not by virtue of the laws of this State but under the provisions of the foregoing Federal statute. In addition to this, at the time the administration of his estate was closed the claim had not accrued. The liability arose more than twenty years after the expiration of the two years within which claims could have been filed against it in the probate court. But the remedy under the act of Congress is applicable, and the estate is liable under its provisions so long as the assets can be reached. The case of *Zimmerman v. Carpenter*, 84 Fed. Rep. 750, involved this

same question. It was there claimed that a plea of the Statute of Limitations, based upon the statute of the State of South Dakota regulating the time in which claims should be presented for allowance or rejection against the estate, barred the claim there presented. In considering the question the court said: "Any theory upon which it is sought to maintain that the claim here attempted to be enforced is an ordinary claim against the estate of the deceased, to be represented and allowed in the manner required by the laws of the State of South Dakota, and if not so presented and allowed to be forever barred by the statute, involves a total misconception of the object, meaning and effect of sections 5151 and 5152 of the Revised Statutes of the United States. Congress provided by these sections that the estate of the testator in the hands of an executor should be liable in like manner and to the same extent as the testator would be if living and competent to act and hold the stock. By the language of section 5152 the death of the testator does not in any way affect the liability of the estate, except if no liability on the stock arises until after the estate is fully distributed then there would be no estate to be charged." Under the facts in this case the liability attached while the assets were in the hands of the trustee, and therefore came directly under the provisions of section 5152, *supra*.

It is next insisted that the remedy of appellee was at law, and not in equity. We do not find that this question was raised either by demurrer to the bill or the answer thereto. It cannot, therefore, be urged now. The decisions of this court to that effect are numerous. The reasons for the practice are manifest. We entertain no doubt, however, that the complainant's complete and adequate remedy was in a court of equity, where, only, ample and complete justice could be done to all parties interested. The creditors of the defunct bank were entitled to the benefit of the assessment guaranteed to them by the act of Congress, and the distributees had no just claim to the bequests given them without the burden

attached to the residuary assets in the hands of the trustee. Why should they receive the full benefit of the bequests given them by the will of Charles Kavanagh and at the same time be relieved of the equitable lien which attached to the residue of the estate in the hands of Mortimer, the trustee?

We think the direction of the Appellate Court in its judgment remanding the cause to the superior court does justice to all parties here interested. Its judgment will accordingly be affirmed.

Judgment affirmed.

THE PEOPLE *ex rel.* John J. Hanberg, County Treasurer,
v.
G. W. STEARNS.

Opinion filed December 22, 1904.

SPECIAL TAXATION—*when sidewalk ordinance is invalid.* A sidewalk ordinance passed under the act of 1875, providing for sidewalks on several different, unconnected streets, is invalid which requires each lot owner assessed to pay a *pro rata* proportion of the cost of all the sidewalks provided for in the ordinance, according to the frontage of his lots upon the streets where the walks are to be built. (*People v. Latham*, 203 Ill. 9, followed.)

APPEAL from the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

ENOCH J. PRICE, for appellant.

GEORGE A. MASON, for appellee.

Mr. CHIEF JUSTICE RICKS delivered the opinion of the court:

This is an appeal by the county collector from an order of the county court of Cook county refusing judgment of sale upon a special sidewalk tax warrant, known as warrant No. C1, of the village of Morgan Park.

Appellee filed one hundred and thirteen objections, the only one relied upon being: "(9a) Said improvement ordinance provides for a 'system' of sidewalks, and is therefore void." Under this objection counsel for objector offered in evidence the copy of the ordinance for the improvement, and, under stipulation, a map showing the portion of the village in which sidewalks are ordered by the ordinance in question.

The ordinance introduced in evidence states upon its face that it is under "An act to provide additional means for the construction of sidewalks in cities, towns and villages," approved April 15, 1875, in force July 1, 1875, and names and describes nine different streets to be improved by the building of sidewalks, and the map introduced in evidence discloses that eight of the streets are disconnected, being in entirely different parts of the village, some of the streets being a mile or more apart. The ordinance provided for payment for the sidewalks as follows: "And that the whole cost thereof be levied on the lots or parcels of land touching upon the line of said sidewalk, in proportion to their frontage upon said sidewalk." No other construction could be placed upon this provision of the ordinance than that each party should pay a *pro rata* proportion of the cost of all the sidewalks provided for in the ordinance, according to his frontage upon the streets where the walks are to be built. The case of *People v. Latham*, 203 Ill. 9, holding a similar ordinance void, is conclusive in this case. No sufficient reason is shown for receding from our views therein expressed, nor is it necessary to extend this opinion to any greater length.

For the reasons stated in the *Latham case*, *supra*, the judgment of the county court will be affirmed.

Judgment affirmed.

CHARLES PINKSTAFF

v.

ALLISON DITCH DISTRICT NO. 2.

Opinion filed December 22, 1904.

1. DRAINAGE—*assessment roll is prima facie evidence of benefits.* The assessment roll in a drainage assessment case is *prima facie* evidence that the lands in the district will be benefited to the extent of the benefits assessed against them.

2. SAME—*what are proper elements of damage to a land owner.* Inconvenience of cultivation occasioned by the digging of the ditch through a tract of land, injury caused by throwing the dirt from the ditch upon the land, and the expense of constructing a necessary bridge across the ditch, are proper elements of damage for the consideration of the jury in correcting a drainage assessment.

APPEAL from the County Court of Lawrence county; the Hon. J. D. MADDING, Judge, presiding.

This is an appeal from a judgment of the county court of Lawrence county confirming the corrected assessment roll of benefits and damages returned by the jury in Allison Ditch District No. 2, a district organized under the Levee act and comprising lands located in said county, so far as it applies to the lands of appellants.

The district was organized for the purpose of widening, deepening and extending certain ditches situated within the boundaries of the district, which prior to the organization of Allison Ditch District No. 2 had been constructed by Allison Drainage District No. 1, which last named district, prior to the organization of district No. 2, had been dissolved by an order of the county court of said county under the provisions of section 47½ of the Drainage act of 1889. The new district contains 11,500 acres of land, and the estimated cost of the proposed drainage system is \$25,000. The appellant owns 480 acres of land located within the district, and the benefits to his lands were assessed at \$1194.75. The

assessment roll and a map of the district were introduced in evidence, and it was admitted the engineer's report showed a necessity for deepening and widening the old ditches within the district in order to furnish an outlet for the waters of the district. No further proof was introduced on behalf of the appellee. The proof of the appellant tended to show his lands were high and dry, or were amply drained by ditches constructed thereon at his own expense prior to the organization of the new district; that the outlet for the drainage of his land through said ditches was ample; that on 40 acres of his land a new ditch was to be constructed; that the dirt taken from the new ditch would be piled along the sides of the ditch, and that it would be necessary to bridge said new ditch to connect the portions of appellant's lands which were severed by its construction. The jury, upon the final hearing, made no change in the original assessment roll so far as it applied to appellant's land, and over his objection the corrected assessment roll was confirmed by the court.

W. F. FOSTER, for appellant.

S. B. ROWLAND, and C. J. BORDEN, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

The record in this case is meagre and imperfectly abstracted. We understand therefrom, however, that the money raised by the assessment in question will be expended mainly in widening, deepening and extending two or more ditches located within the district, into which the land owners of the district may drain the waters from their lands, and which, when connected by laterals into one main ditch, will carry the accumulated waters of the district into the Wabash river, into which the main ditch empties. The lands of the appellant are located in the part of the district which is situ-

ated most remotely from the river, and the waters, therefore, from his lands will flow a longer distance before reaching the river than the waters which flow from the lands situated in the district located near the river, and it is apparent the old drains constructed by appellant upon his lands will be of little value, if any, for drainage purposes, unless the waters carried therein can find an outlet by means of which they will be carried away from his lands. The jury went upon the lands of the district, including those of appellant, and the assessment roll prepared by them is *prima facie* evidence that the lands of the district, including those of appellant, will receive the amount in benefits assessed by the jury against the several tracts located within the district, from the construction of the system of drainage proposed within the district. *Trigger v. Drainage District No. 1*, 193 Ill. 230.

The proofs by which the *prima facie* case made by the introduction of the assessment roll was sought to be overcome was confined almost wholly to the testimony of appellant. From a reading of the testimony of appellant and the witnesses called by him, as abstracted, we think the court did not err in confirming the action of the jury as to the lands of appellant located within the district, with the exception of the south-west quarter of the north-west quarter of section 28, township 4, range 10, west, which 40 acres is the tract of land upon which a new ditch is proposed to be constructed. The court, upon the hearing, instructed the jury "that in correcting their assessment roll of the south-west quarter of the north-west quarter of section 28, in township 4, north, range 10, west, belonging to Charles Pinkstaff, that the jury must consider and allow as proper elements of damage the inconvenience of cultivation by reason of difficulty of access to the different parts of his land by reason of being severed by the digging of the ditch thereon, and also the damages for injury caused by throwing dirt from the ditch on said land, and the damages caused by the construction of a bridge across

the ditch, if the jury should find a bridge to be necessary." In *McCaleb v. Coon Run Drainage and Levee District*, 190 Ill. 549, the elements of damage pointed out in this instruction were recognized as proper elements to be taken into consideration by the jury in assessing damages to lands to be assessed within a district organized under the Levee act. The proof shows, without question, that a new ditch was to be constructed across said 40-acre tract; that the tract would be severed thereby; that the ditch was of such size that, when completed, the dirt excavated therefrom would, when piled along the side of the ditch, form substantial embankments, and that it would be necessary to bridge the ditch in order that appellant might have full access to his lands located upon either side of said ditch. The statute required the jury, in the assessment roll, to state in separate columns the amount of benefits assessed, the amount of damages allowed and the excess of either benefits or damages. The jury stated in the assessment roll, in the proper column, that the benefits to said 40-acre tract will be \$170, and expressly found that the tract will not be damaged in any amount. This finding was contrary to the law and the evidence, and the county court erred in confirming the assessment roll so far as it applied to said 40-acre tract.

The judgment of the county court confirming the assessment roll as to the south-west quarter of the north-west quarter of section 28, township 4, north, range 10, west, will be reversed. As to the other lands of appellant embraced in the assessment roll the judgment of the county court will be affirmed and the case will be remanded to the county court for further proceedings in accordance with the views herein expressed. The parties will pay their own costs in this court.

Affirmed in part and remanded.

CHARLES H. SLACK

v.

KATE KNOX.

Opinion filed December 22, 1904.

1. **CONTRACTS**—*the interpretation parties have put upon contract may be looked to by the courts.* In construing a contract it is permissible for the court to look to the interpretation which the parties have put upon it by their conduct.

2. **LEASES**—*when right to an additional service does not pass by implication.* If, after the execution of the lease, the lessor agrees to render an additional service not mentioned in the lease for an additional consideration, the execution of a second lease without mentioning the additional service, the agreement for which is still being performed by both parties, does not pass the right to such service to the lessee by implication, as an incident to the lease. (*Thomas v. Wiggers*, 41 Ill. 470, distinguished.)

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JESSE HOLDOM, Judge, presiding.

This was a bill for an injunction filed on August 31, 1903, in the superior court of Cook county, by Kate Knox, the appellee, against Charles H. Slack, the appellant, to restrain the latter from interfering with a certain steam pipe which transmitted steam from a boiler owned by appellant to certain tables and a hot water tank owned by the appellee. A temporary injunction was issued in accordance with the prayer of the bill. The defendant appeared and filed a general and special demurrer, which was overruled by the court, and defendant standing by the demurrer, a decree was entered making the injunction permanent. Slack appealed to the Appellate Court for the First District, where the decree was affirmed, and has prosecuted a further appeal to this court.

The facts relied upon by appellee to support the decree and as set forth in her bill are substantially as follows:

On October 30, 1899, appellant leased to appellee the second floor of a six-story building in the city of Chicago for a term commencing November 10, 1899, and ending April 10, 1902, at a monthly rental of \$500. The lease provided that the premises were to be used for a woman's club room, and for no other purpose, and also provided that the lessor should furnish steam heat, without charge, from September 1 to April 30 during the term of the lease. Appellee entered into possession of the premises and arranged and furnished part thereof as parlors and reading rooms and the remainder as a restaurant, with a kitchen connected therewith. There were installed in said kitchen a range and also certain steam-heated tables, by means whereof the food could be kept warm after being cooked, and a tank or boiler for heating water for use in washing dishes and cooking utensils, cleansing rooms and for other purposes. Slack, the lessor of the premises, maintained in the basement of the building a steam heating plant, consisting of an engine and boiler and steam pipes conveying steam to the different portions of the building for heating and other purposes. Appellee, with the knowledge and acquiescence of appellant, and under the direction and supervision of the engineer in charge of appellant's steam boiler, caused a steam pipe to be connected with the boiler and to be extended to and connected with the steam tables for the purpose of heating them, and also to the water tank for the purpose of heating water therein. Slack requested appellee, in consideration of the steam so furnished by him, to clean and keep clean certain hallways and stairs at her own expense, which she agreed to do, and which she did do up to the time the bill was filed herein.

On July 25, 1901, another lease, containing practically the same terms and conditions as the first one, was executed and entered into between the same parties and for the same premises, for a term commencing April 10, 1902, and ending April 30, 1907. The connection with appellant's boiler

was still maintained, and appellee continued to keep the hallways and stairs clean. On August 5, 1903, appellee received a letter from appellant, stating that the excessive use of water and steam by her and the increased cost of coal and labor, made it impossible for him to continue to furnish her with steam for her kitchen in exchange for the service rendered him in keeping the hallways and stairs clean, and that if she desired him to furnish steam for the tank and tables after August 31, it would cost her \$50 per month in addition to said service. The complainant was using the same amount of water and steam as she had been using theretofore during her tenancy, except as such use may have been increased by the growth and expansion of her business. She was then furnishing meals to about 2400 persons daily.

The appellant threatened to shut off the supply of steam carried through the pipe in question after August 31, and appellee filed the bill for an injunction, alleging that if the steam was shut off for a single day, it would cause her great annoyance and loss and serious damage to her business, and that if the steam was not furnished as aforesaid, she could continue to carry on her business and make use of the premises for the purposes designated in the lease only by the erection of a steam plant upon the premises occupied by her, which could not be done without great expense, and that she would also thereby be deprived of the use of a portion of the premises for her business on account of the loss of the space which such plant would occupy.

Appellant here contends that the bill does not state a cause of action, (1) because the lease gives to appellee no right to steam for the purposes for which she is using it, and the lease cannot be modified or changed by proof of a subsequent parol agreement or understanding giving that right; and (2) because the permission given to appellee to use steam for the tank and tables was a mere license, revocable at any time by appellant, and such license was revoked by the letter of August 5, 1903.

MUSGRAVE, VROMAN & LEE, for appellant.

F. P. SIMONS, and PLINY B. SMITH, for appellee.

Mr. JUSTICE SCOTT delivered the opinion of the court:

Appellee urges that she has the right to have the demised premises, with all their appurtenances and beneficial rights, maintained, throughout the term of the lease, in the same condition they were in during the former occupancy and at the time of the execution of the new lease, and contends that the right to have the steam pipe connect the steam boiler in the basement of the building with the hot water tank and steam tables on the premises leased by her, and to have steam supplied through that pipe, passed to her, by implication, as an appurtenance or easement under the second lease, for the reason that, in view of the facts stated in the bill, it is apparent that it was the intention of the parties to the lease, at the time of the execution of the second lease, that the appellee was to have the steam pipe and connections continued in the same condition and situation in which they then were, during the term of that lease.

At the time of the execution of the first lease, the pipe was not in position and no connection existed between the water tank and steam tables owned by the appellee and the boiler in the basement of the building. The tank and the tables were placed on the premises after the execution of the first lease, and the connection with the boiler was made at the instance of the appellee under an oral contract, separate and distinct from the lease, as we think.

Appellee urges that this is not a correct view of the matter, and that the pipe was installed and the connections made by appellant's leave without any consideration therefor passing to him and without any new contract, and that it is therefore to be regarded as though done in the first instance under the terms of the first lease. Her contention in this regard is inconsistent with the following language found in the bill,

to-wit: "That while said lease provided that the defendant should supply the complainant with steam heat from the first day of September to the thirtieth day of April in each year, said lease contained no provision specifically relating to said connection between said steam boiler and complainant's said apparatus and defendant thereupon requested complainant in consideration of said connection with said steam boiler to clean and keep clean the hallways and stairs from the second floor of said building to the front doorway or public entrance thereto at her own expense, which said complainant consented to and thereafter did." It is apparent that the right to the use of this connection with the boiler and to the steam thereby conveyed did not pass by implication under the first lease, for the reason that at the time that lease was executed, the pipe was not in position nor were the tank and tables, in connection with which it was afterwards used, on the premises at all, so that there was nothing in the condition of the property, which was the subject of the contract, to indicate that it was the intention of the parties that appellee was to have the use of the pipe and steam thereby conveyed under the terms of that lease; and construing the language quoted above from the bill, as it must be construed, most strongly against the pleader, we think it shows that the connection between the boiler and the tank and steam tables was made pursuant to a contract by which appellant was to permit that connection and furnish steam, and appellee was to clean the hallways and stairs from the second floor of the building to the entrance thereof.

It is elementary that this oral contract did not alter or vary the terms of the original lease, which was under seal and made prior to the time the oral agreement was made. (*Baltimore and Ohio and Chicago Railroad Co. v. Illinois Central Railroad Co.* 137 Ill. 9, and cases there cited.) Consequently, at the time of the execution of the second lease, the appellee was enjoying the use of the pipe and the steam thereby conveyed, not under the terms of the original lease

nor as an appurtenance or easement connected with the property granted, but under the oral agreement made subsequent to the lease last mentioned, and inasmuch as the second lease is also silent as to this pipe and the steam by it supplied, we do not think it can be said that the use of that pipe and the steam necessary for the steam tables and tank passed to appellee by implication or on the theory that it was the intention of the parties that such use should be included in the lease, as an appurtenance or easement.

After the beginning of the term covered by the second lease and down to the time that this difficulty arose between the parties hereto, appellee continued, at her own expense, to keep the hallways and stairs clean in accordance with the terms of the oral agreement. If it was the intention of the parties that the right to the use of the pipe and the steam should pass by the second lease, how can these acts of the appellee be explained? Manifestly no duty was imposed on her by the second lease to clean the hallways and stairs. Had she failed to do that work, an action of covenant on the lease certainly could not have been brought against her to recover upon a cause of action resulting from her default in that respect. The conclusion is irresistible that she incurred that expense because she believed that she was thereby compensating appellant for the use of the pipe and the steam which it supplied; and if she was so doing, then she was accepting and receiving the steam under the oral agreement and not under the lease.

It is permissible, in construing a contract, to look to the interpretation that the parties thereto have placed thereon, in its performance, for assistance in ascertaining its true meaning. "No extrinsic aid can be more valuable." *Vermont Street M. E. Church v. Brose*, 104 Ill. 206; *Storey v. Storey*, 125 id. 608.

Appellee relies particularly upon the case of *Thomas v. Wiggers*, 41 Ill. 470. In that case it appeared that a tenant under an earlier lease had used the exhaust steam from an

engine which was conducted by means of a pipe from the engine to a steamer used by the tenant, and that this steam was essential to the conduct of his business. This court held that under the terms of his second lease, which provided as the first had done that he should have a certain portion of the building together with one-half of the steam power produced by the steam engine located therein, he was entitled to the use of the exhaust steam as he had previously used it and was using it at the time the second lease was made. This is put upon the ground that in the construction of grants, the courts ought to take into consideration the circumstances attendant upon the transaction, the particular situation of the parties and the state of the thing granted, for the purpose of ascertaining the intent of the parties, and that the defendant well knew when he signed the second lease that the plaintiff understood that he was acquiring the right to use the exhaust steam in the precise manner in which he was then using it under the first lease. That case is distinguished from the one at bar by the fact that here appellee was enjoying the right now in controversy under a contract separate and distinct from the first lease, and was paying for the enjoyment of that right a valuable consideration in addition to the rent reserved by the lease. Under such circumstances, it cannot be said that it was the intention of the parties that this right should be included in the new lease. In the *Thomas case*, at the time of the execution of the new lease, there was no contract except the old lease under which the right could have been enjoyed. In this case, the right was being enjoyed under a separate contract, and the presumption which arose in the *Thomas case* that the parties intended that the right should be enjoyed under the second lease, does not arise here. On the contrary, following the reasoning in that case, we arrive at the conclusion that the parties intended that the right in question should be regulated by the same contract under which it existed at the time of the execution of the second lease, viz., the oral contract.

As the oral contract fixed no term during which it should continue in force, either party thereto had a right to terminate it upon reasonable notice to the other.

The judgment of the Appellate Court and the decree of the superior court will be reversed, and the cause will be remanded to the latter court with directions to sustain the demurrer to the bill.

Reversed and remanded, with directions.

THE CINCINNATI, INDIANAPOLIS AND WESTERN RY. CO.

v.

THE PEOPLE *ex rel.* Edward R. Moffett, County Treasurer.

Opinion filed December 22, 1904.

1. TAXES—*what is not a sufficient levy of county taxes.* Under section 121 of the Revenue act a resolution of the county board directing the clerk to extend the amount of seventy-five cents on each \$100 valuation for the "current expenses" of the county is not sufficient, it being the purpose of the statute that the board shall determine the amount of all taxes to be raised for county purposes and state the amount for each purpose separately, leaving the clerk to determine the rate per cent. (*Mix v. People*, 72 Ill. 241, and *Chicago and Alton Railroad Co. v. People*, 155 id. 276, distinguished.)

2. SAME—*designation of town tax as for "town purposes" is not sufficient.* A town tax is invalid where the clerk's certificate recites that the annual town meeting had voted to levy a certain amount for "town purposes," without reciting the particular purposes and the amount required for each.

3. SAME—*when statement attached to clerk's certificate is a part thereof.* A statement under the hand of the town clerk, attached to his certificate of levy of a town tax, specifying the purposes of the tax and the amount required for each, and corresponding with the record of the annual town meeting introduced in evidence, is properly treated as a part of the certificate.

4. SAME—*the right of electors to vote tax levy in anticipation of demands.* Under the Township Organization act the electors, at the annual town meeting, may levy taxes in anticipation of demands that will thereafter arise against the town for services rendered by its officers, and for other proper charges of like character.

218	197
213	227
218	1467
218	1620
214	24
214	1808

5. SAME—*effect where there is a deficiency for payment of audited demands.* Claims and demands audited by the board of town auditors should be paid immediately if there is sufficient money in the proper fund or funds, the deficiency, if any, to be included by the town clerk in the next certificate of levy made by him, in addition to the amount of the levy made by the electors at the annual town meeting.

6. SAME—*a certificate of road tax levy need not specify amount required for each purpose.* It is not necessary that the highway commissioners' certificate of levy of road and bridge taxes, made under section 119 of the Road and Bridge act, shall specify the amounts required for the several purposes. (*Cincinnati, Indianapolis and Western Railway Co. v. People*, 212 Ill. 518, followed.)

7. SAME—*filing original certificate of levy is fatal to tax.* Filing, by the town clerk, of the original certificate of levy made by the highway commissioners in a town under the "cash" system, instead of the certified copy required by section 16 of the Road and Bridge act, invalidates the tax, and the irregularity cannot be cured on application for judgment of sale by filing a certified copy.

8. SAME—*what not a valid objection to city tax.* The fact that the amounts levied in a tax levy ordinance for the various purposes are less than the amounts appropriated for the same purposes in the appropriation ordinance is not a valid objection to the tax.

APPEAL from the County Court of Macon county; the Hon. O. W. SMITH, Judge, presiding.

GEORGE W. FISHER, for appellant.

W. E. REDMON, State's Attorney, for appellee.

Mr. JUSTICE SCOTT delivered the opinion of the court:

This is an appeal from a judgment of the county court of Macon county, rendered at the June term, 1904, for certain taxes of the year 1903, extended by the county clerk of said county against the real estate of appellant. The taxes involved include county tax for the county of Macon; town taxes for the towns of Decatur, Blue Mound and Long Creek; road and bridge taxes for the towns of Blue Mound and Long Creek; and city tax for the city of Decatur.

The objection made to the county tax is that the resolution of the board of supervisors merely directed the clerk to

extend the amount of seventy-five cents on each \$100 of valuation for the current expenses of the county, when it should have specified the sums of money to be raised and the specific purpose for which each sum was required.

Paragraph 6 of section 25, chapter 34, Hurd's Revised Statutes of 1903, empowers the county board annually to cause the levy and collection of taxes for county purposes, not exceeding seventy-five cents on the \$100 valuation. Section 121 of chapter 120, Hurd's Revised Statutes of 1903, reads as follows:

"The county board of the respective counties shall, annually, at the September session, determine the amounts of all taxes to be raised for county purposes, the aggregate amount of which shall not exceed the rate of seventy-five cents on the \$100 valuation of property, except for payment of indebtedness existing at the adoption of the present State constitution, unless authorized by a vote of the people of the county. When for several purposes, the amount for each purpose shall be stated separately."

Section 127 of the same chapter is in the following language:

"The said clerks shall estimate and determine the rate per cent upon the proper valuation of property in the respective towns, townships, districts and incorporated cities, towns and villages in their counties, that will produce, within the proper divisions of such counties, not less than the net amount of the several sums that shall be required by the county board, or certified to them according to law."

It is to be observed that section 121, *supra*, directs the board to determine, not the amount of taxes for county purposes, but "the amounts of all taxes to be raised for county purposes," and "when for several purposes, the amount for each purpose shall be stated separately." Section 127, *supra*, directs the clerk to determine the rate per cent which will produce, not the amount or sum required by the county board, but that will produce "not less than the net amount

of the several sums that shall be required by the county board." It is apparent from the two sections last cited that the legislature intended that the county board should ascertain the total of county taxes to be levied each year under its authority by determining the amount that would be required for each purpose for which county taxes may be levied, the aggregate of such amounts to be the total county tax; for example, a certain sum for the pauper fund, a certain sum for the fund for the purchase of supplies for county offices; if the county is engaged, or is about to engage, in building, a certain sum for the building fund; if its property requires repair, a certain sum for the repair fund; and so with each of the purposes for which the county board is authorized to levy taxes and for which it may require money.

The levy here was for seventy-five cents on the \$100, and specified no purpose except to state that it was for "current expenses." This designation is too general. The resolution was passed by the board before the total amount of the assessment of property in the county had been ascertained, and before the county board could know what amount of money would be produced by the seventy-five cent rate. The legislature did not intend to put it in the power of the county board to levy a seventy-five cent tax without reference to the needs of the county, but did intend that the total amount of the tax should be determined by an ascertainment of the sum needed by the county for each purpose for which it may levy taxes.

We have invariably held that, under similar statutes, a levy for town taxes must specify the various purposes for which the tax was levied, and that a designation of the tax as "for town purposes," is not sufficiently definite, (*People v. Chicago and Alton Railroad Co.* 194 Ill. 51; *Indiana, Decatur and Western Railway Co. v. People*, 201 id. 351; *Cincinnati, Indianapolis and Western Railway Co. v. People*, 207 id. 566;) and that an ordinance for the levy of city or village taxes must specify in detail the several purposes for

which the tax is levied. (*People v. Peoria, Decatur and Evansville Railroad Co.* 116 Ill. 410; *Cincinnati, Indianapolis and Western Railway Co. v. People*, *supra*.) There is no distinction between this case, in so far as it affects the county tax, and cases arising under the statutes authorizing the levy of township and city or village taxes.

Appellee relies upon the case of *Mix v. People*, 72 Ill. 241. In that case the amount of the county tax extended was \$25,000. That sum had been fixed by an order of the county board which merely adopted the report of a committee recommending that a tax in that amount be levied. The only question considered by this court was whether or not that order levied the taxes. The objection that the county board had not stated specifically the various purposes for which the tax was to be levied does not seem to have been either made or considered, and the case is therefore not authority so far as the objection now before us is concerned.

We are also referred to cases in which this court has held that a levy made by taxing officers of a certain number of cents on the \$100, instead of fixing the total amount of the levy, while not in strict accordance with the statute, was sufficient, and that taxes extended thereunder were valid. Those under existing statutes are cases in which the tax could have been for but one purpose, as in *Chicago and Alton Railroad Co. v. People*, 155 Ill. 276, where on each \$100 of the assessment, two dollars was levied for school purposes and one dollar and fifty cents for building purposes. Those cases are distinguishable from the one at bar by the fact that the tax levied by a fixed percentage could be used for one purpose only and not for a number of purposes as in the case of county taxes levied for current expenses.

Gage v. Bailey, 102 Ill. 11, is not in point, as the town tax there levied at a certain rate per cent was imposed under the provisions of article 10 of chapter 103, Gross' Statutes of 1868, which differed materially from the statute now under consideration.

The objection to the Decatur town tax is that the certificate of the town clerk recites that at the annual town meeting held in that town it was voted to levy \$3000 as a tax for town purposes, when it should have specified the purposes, for which that amount was required and the amount required for each purpose. The same objection is made to the Blue Mound town tax.

We have so frequently held that such a designation of a town tax is insufficient that a reference to the cases on that subject is no longer necessary.

The certificate of the levy of town tax made by the town clerk of the town of Long Creek states that at the annual town meeting, there was voted to be levied as a tax for town purposes the sum of \$432. Attached to the certificate, when filed with the county clerk, was a statement under the hand of the town clerk specifying the purposes for which that amount was to be raised and giving the sum required for each purpose. The record of the annual town meeting, introduced in evidence by the People also showed the several purposes for which the sum of \$432 was required, together with the amount required for each purpose, and corresponded with the statement attached to the certificate of levy. The objection to this levy is first that it does not designate the purposes of the tax.

The statement attached to the certificate of levy for this town tax, we think, should be regarded as a part thereof. So considering it, the certificate meets the requirements of the statute. This statement showed the purposes of the tax were to pay compensation of town officers, to pay for auditing the accounts of the town, and to pay election expenses, properly specifying the amount for each purpose.

Section 121 of chapter 139, Hurd's Revised Statutes of 1903, directs the board of auditors to "examine and audit all charges and claims against their town and the compensation of all town officers except the compensation of supervisors for county services." Section 124 of the same chapter

directs the board to make a certificate showing the claims and demands allowed, and file the same with the town clerk, and the section then continues: "The aggregate amount thereof shall be certified to the county clerk at the same time and in the same manner as other amounts required to be raised for town purposes, which shall be levied and collected as other town taxes." The third paragraph of section 40 of the same chapter authorizes the electors at the annual town meeting, to direct the raising of money by taxation for constructing roads and bridges, for the prosecution and defense of suits, and "for any other purpose required by law." The second objection to this tax is, that if it is for compensation already earned, and expenses already incurred that the levy could only be made in pursuance of the certificate of the board of town auditors, as provided by section 124, *supra*, and that if the levy is for future compensation and future expenses, no power exists in the electors at the annual town meeting to levy taxes in anticipation of claims and demands against the town. Appellant's contention is that no tax can be levied by the town authorities to pay the compensation of its officers until after the claims for compensation have been audited by the town board and certified to the town clerk. If this be the true construction of the statutory provisions on the subject, a town officer who, for example, performs some official duty in the autumn of 1904 after the town clerk has filed his certificate of levy for the taxes of that year with the county clerk, and after the second meeting of the board of auditors in that year, would have his claim for the performance of that duty audited and certified to the town clerk in 1905 and included in the tax levy of that year and collected and paid to him in 1906—about eighteen months after the services had been performed. We think such a construction violates the legislative intent as manifested by the enactment under consideration. Section 126a of chapter 139, *supra*, evidently contemplates the payment of claims and demands against the town immediately after they have been audited

and certified to the clerk. The statute authorizing a levy of taxes in accordance with the auditors' certificate and the statute authorizing a levy in accordance with the direction of the electors at the town meeting must be construed together. We hold that the electors, at the annual town meeting, are authorized to levy taxes in anticipation of demands that will thereafter arise against the town, for services rendered by its officers, and for other proper charges of like character; that when the auditors make their certificate to the town clerk of claims and demands allowed, such allowances should be immediately paid, provided there is money on hand in the proper fund or funds sufficient for the purpose, the deficiency, if any, to be included by the town clerk in the next certificate of levy made by him, the amount of such deficiency to be in addition to the amount of the levy made by the electors at their annual meeting. By pursuing this course, the town will ordinarily have on hand funds to meet its current expenses as they arise, and in case of a deficiency, the same will be met by a levy made upon the auditors' certificate.

The certificate of the road and bridge tax for the town of Long Creek did not state the total sum required, but specified that the amount was sixty cents on each \$100 valuation. This town is under the "labor" system, and the commissioners attempted to act under section 119 of chapter 121, Hurd's Revised Statutes of 1903. The certificate recited the purposes for which the amount was required, but did not specify the amount required for each purpose or the total amount of the levy. The record of the commissioners' meeting at which the levy was made being introduced in evidence, showing the amounts required for the several purposes respectively, and the total sum, the court permitted the certificate to be amended by inserting the total amount required as shown by the record of the commissioners. The objection made is that the certificate, as amended, does not show the amount required for each of the several purposes specified in the certificate.

We have considered this question at the present term of this court in the case of *Cincinnati, Indianapolis and Western Railway Co. v. People*, 212 Ill. 518, and determined that the defect pointed out by this objection is not fatal to the tax.

The document from which the county clerk extended the road and bridge tax for the town of Blue Mound, at the rate of eighty cents on each \$100 of valuation, stated that the rate per cent agreed upon by the commissioners of highways, at their semi-annual meeting, was sixty cents. This document is signed by the three commissioners of highways and is not certified by the town clerk. Attached to it was the written consent of the assessor and board of town auditors, granted upon the petition of the commissioners, for an additional levy, not exceeding twenty cents. The certificate of the commissioners of highways filed in the office of the town clerk was received in evidence and showed the rate per cent to be eighty cents instead of sixty cents, and the town clerk testified that by mistake he wrote sixty cents in the document filed with the county clerk, and which he copied from the one filed with him, instead of eighty cents as specified in the latter document. Thereupon the court permitted the People to amend the paper filed with the county clerk, on which the tax had been extended, by substituting eighty cents for sixty cents, and gave leave to the town clerk to file a certificate of the levy as of September 3, 1903. The town clerk thereupon made a certificate of the levy and dated the same September 1, 1903, and the same was filed by the county clerk, during the progress of the trial of this cause, on June 15, 1904, as of September 3, 1903. The objection made to this tax is that there was no certificate of the town clerk on file with the county clerk when this tax was extended, and that the filing of the certificate on June 15, 1904, came too late to obviate this objection.

The town is under the "cash" system, and the tax was levied by the commissioners of highways under sections 13 and 14 of chapter 121, Hurd's Revised Statutes of 1903.

Section 16 of that chapter directs that the certificate made by the commissioners shall be lodged with the town clerk, and that the town clerk shall certify the levy to the county clerk to be by him extended. In this case, the town clerk did not certify the levy, but, instead, filed with the county clerk the original certificate made by the commissioners, accompanied by their petition to the assessor and board of auditors and the consent of the last mentioned officers to the additional levy.

In *Village of Russellville v. Purdy*, 206 Ill. 142, we held, under a statute requiring that a certified copy of the tax levy ordinance of a city or village shall be filed with the county clerk as a warrant for extending the tax levied by the ordinance, that filing the original of the tax levy ordinance or the original of the appropriation ordinance upon which the tax levy was based, would not authorize the clerk to extend the tax. The same rule must prevail here. The town clerk failed to file a certificate of the levy. There was nothing to amend. The certificate of the levy of the tax is jurisdictional. (*People v. Chicago and Northwestern Railway Co.* 183 Ill. 311; *Indiana, Decatur and Western Railway Co. v. People*, 201 id. 351.) Had the clerk filed a certificate which varied from the certificate filed with him by the highway commissioners, that variance might have been cured by amendment; not so, however, where he failed entirely to file the certificate required by the statute.

The objection made to the city tax of the city of Decatur was that it did not appear that the amounts levied for various purposes by the tax levy ordinance had been appropriated for the purposes mentioned in that ordinance.

Within the first quarter of the fiscal year, the city council of the city of Decatur passed the annual appropriation bill, properly specifying the objects and purposes for which the appropriations were made and the amount appropriated for each purpose, the aggregate of the appropriations being \$165,000. On the fourth day of September, 1903, the coun-

cil passed the annual tax levy ordinance, which specified in detail the objects and purposes for which the tax was to be levied and the amount levied for each purpose or object, a certified copy of which was the county clerk's authority for extending the city tax objected to. The total amount levied was \$99,755.80. Each object and purpose specified in the tax levy ordinance as an object and purpose for which the tax is levied is specified in the appropriation bill as an object and purpose for which money is appropriated. In some instances, the amount appropriated is in excess of the amount levied. In no instance is the amount levied for a particular purpose in excess of the amount appropriated for that purpose. We do not think the fact that the amount levied is less than the amount appropriated a valid objection to the tax where the purpose for which the levy is made is the same for which the appropriation is made. Here the purposes for which the levy was made are the same as those for which the appropriations were made, and the tax should be regarded as levied to meet in part the appropriation bill.

The judgment of the county court will be reversed as to the county tax, the town taxes of the towns of Decatur and Blue Mound and the road and bridge tax of the town of Blue Mound, and will be affirmed as to the town tax of the town of Long Creek, the road and bridge tax of the town of Long Creek and the city tax of the city of Decatur, and judgment will be entered in this court against appellant for the town tax of the town of Long Creek in the sum of \$44.05, and in addition thereto five per cent damages thereon, for the road and bridge tax of the town of Long Creek in the sum of \$229.83, and in addition thereto five per cent damages thereon, and for the city tax of the city of Decatur in the sum of \$256.05, and in addition thereto five per cent damages thereon, and the clerk of this court is directed to transmit to the county collector of Macon county a certified copy of the judgment herein.

Affirmed in part and judgment in this court.

JOHN W. HALL

v.

DAISY GABBERT.

Opinion filed December 22, 1904.

1. **ILLEGITIMATES**—*courts will not presume that marriage was to avoid result of prosecution.* Courts will not presume that one arrested for bastardy who marries the prosecutrix did so to avoid the consequences of the prosecution, but will rather assume that if there was any doubt of his paternity of the child he would have resisted the prosecution and refused marriage.

2. **SAME**—*domicile of father at time of birth of child does not control right to inherit in other States.* The law of the domicile of the father at the time of the birth of an illegitimate child does not control the question of the effect of a subsequent marriage with the mother, in so far as it affects the right of the child to inherit real property in another State, since the descent of real estate is governed by the law of the situs.

3. **SAME**—*law legitimating child is a rule of property.* Section 3 of the Statute of Descent, which provides that an illegitimate child whose parents have intermarried and whose father has acknowledged him as his child shall be legitimate, is a rule of descent of real property, and one bringing himself within the rule may inherit land in Illinois even though he could not inherit land in the State where the father resided at the birth of the child.

4. **PARTITION**—*when court cannot refuse partition.* Where the rights of minors are not involved a court of equity cannot refuse to grant partition if the parties have brought themselves within the provisions of the statute authorizing the same.

5. **SAME**—*decreeing partition before estate is settled is not reversible error.* Entering a decree for partition or sale before the estate is finally settled is not reversible error although the practice is not approved, but in case a sale is ordered the personal representative should be brought into court, and the court should control the time of sale, or the funds arising therefrom, to protect the interests of creditors of the estate. (WILKIN, CARTWRIGHT and HAND, JJ., dissenting.)

APPEAL from the Circuit Court of Peoria county; the Hon. N. E. WORTHINGTON, Judge, presiding.

ARTHUR KEITHLEY, for appellant.

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SHEEN & MILLER, for appellee.

Mr. CHIEF JUSTICE RICKS delivered the opinion of the court:

This is an appeal from the decree of the circuit court of Peoria county for partition, growing out of a conceded state of facts and involving but two points of law. The principal question is as to the heirship of appellee, Daisy Gabbert. The only other question presented is as to the right to file a bill for partition before the estate of the deceased is settled in the probate court.

The facts in reference to the heirship of appellee are substantially as follows: On November 23, 1873, and some time prior thereto, one Alice Hannahs resided in Cincinnati, Ohio, and on the date last named gave birth to appellee in that State. In July, 1874, the intestate, William C. Hall, was arrested in Cincinnati on the charge of bastardy, upon the complaint of said Alice Hannahs imputing to him the paternity of appellee. This proceeding was settled by the marriage of appellee's mother and the said Hall on July 9, 1874, and immediately after the marriage said Hall left Cincinnati and never lived or cohabited with the said mother of appellee after the said marriage ceremony. Appellee, when but an infant, was committed to a children's home in Cincinnati where she remained until she was five years old, when she was adopted by a Mr. and Mrs. Beuhla, who removed to California, taking appellee with them, and appellee continued to reside in that State from that time. So far as appellee could remember she never saw her father nor heard directly from him until the fall of 1898, when she sent a letter to the chief of police of Pekin, Illinois, the then home of her father, inquiring of his whereabouts. This letter was shown to the father by the chief of police, and thereupon the father admitted the paternity of the child; told the chief that in 1873, and prior to that time, he was working in the railroad yards in Cincinnati; that he kept company with appellee's mother;

that they were engaged to be married and that by him appellee's mother became pregnant; that the marriage was put off from time to time until appellee's mother had given birth to appellee, when he was arrested upon the charge of bastardy, and that he married appellee's mother in settlement of that charge and deserted the mother and child, leaving Cincinnati and in the year 1875 settling in Pekin. He further stated that the mother of appellee died in 1878, and that after her death he returned to Cincinnati and went to the old home and endeavored to find appellee; that he traced her to the children's home and there learned of her adoption but was refused the names or whereabouts of the persons that had adopted her, as the rule was that such information should not be given except with the consent of the persons adopting a child from such establishment. The father, after the death of the appellee's mother, again married, and his widow, Vallie R. Hall, and his son by his last marriage, John William Hall, survived him. After receiving the information of the whereabouts of appellee her father immediately began correspondence with her, addressing her as "My dear daughter" and closing his letters with the expression "Your father," and during the fall of 1898 wrote letters to the children's home at Cincinnati for the purpose of verifying her history, enclosing the letter of inquiry, and following his signature to the letter with the words, "Her father." In the fall of 1898 or winter of 1898 and 1899 appellee's father and his then wife went to California and visited four weeks with appellee, and he there declared himself the father of appellee and her child. He brought appellee home with him on that occasion, to Peoria, where he then resided, and introduced her to various and numerous friends as his daughter, stating that he was glad and proud he had found her. From the time he first learned of her whereabouts until the time of his death they continuously corresponded. In the fall of 1900 appellee's father and his said wife went to California for the health of the husband, stopping part of

the time with appellee. While in California said Hall died intestate, seized of the real estate in Peoria in controversy.

The original certificate of marriage and duly authenticated copy of the record of marriage of said William C. Hall and Alice Hannahs were admitted in evidence, as were also the letters, declarations and admissions of said William C. Hall as to his paternity of appellee, and the details of the circumstances attending and surrounding her birth and identity as given by Hall. No complaint is made as to the admissibility of this evidence or any of the evidence contained in the record, the principal controversy being, so far as the question of heirship is concerned, that if it be admitted that all the evidence shows or fairly tends to show is true, still appellee cannot take an interest in the real estate in question, because, it is claimed, the evidence fails to show that the father recognized appellee as his child during the existence of the marriage relation between himself and the appellee's mother, and that the recognition of appellee by her father in 1898 and 1899 did not have the legal effect intended by our statute for the purpose of legitimating children born out of wedlock. It is further contended by appellant that upon this record appellee cannot be held, under our statute, to have been legitimated by the marriage of appellee's father and mother in Ohio, for the reason that there are certain depositions in the record showing that at the time of the birth of the appellee the domicile of said William C. Hall was at Pierceville, in the State of Indiana, and that the law as applied to illegitimates is, that the domicile of the father at the time of the birth of the child determines its capacity to be legitimated by a subsequent marriage, and that this record contains no evidence showing that at the time of the birth of appellee the laws of Indiana recognized such method, or any method, of the legitimation of bastard children.

In support of the contention of appellant two cases are relied upon: *Munro v. Munro*, 1 Rob. (Scot. App. H. L.) 492, and *Blythe v. Ayres*, 96 Cal. 532, (19 L. R. A. 40.) In

both of these cases the birth was in England, and by the laws of that country the status of illegitimacy was so indelible it could only be removed and the child be legitimated by an act of parliament. In the *Munro case* a Scotch gentleman bore illicit relations with an English woman in England, through which a child was born, and the parents subsequently married in England and the father recognized the child as his child. The mother and the child remained in England until after the death of the father. Upon the death of the latter the child claimed heirship by the laws of Scotland. In the *Blythe case* an illegitimate child was born of the bodies of Thomas H. Blythe and Julia Perry while the mother was a resident of England. The father, after the conception and prior to the birth, left England and came to America and settled in California. The mother and child remained in England until after the death of the father. The latter died possessed of a large estate in California and the child asserted heirship. In the code of California two distinct provisions existed relative to illegitimates. The first, as section 230, seemed to relate solely to legitimation of such children, and provided that it might be done by the public recognition of the child by the father and receiving the child into his family with the consent of his wife, if married, and otherwise treating the child as his child. The other was section 1387 of the code, which was a statute of descent, and provided that if the father recognized, in writing signed by him and witnessed by a competent witness, an illegitimate child as his child, the child should be his heir. It was found as a fact in the *Blythe case* that the father had publicly acknowledged the child; that he had no family, but that he treated the child as his child; and it was further found, under section 1387, that by a writing, in the presence of two witnesses, he acknowledged himself to be the father of the child. In both the *Munro* and *Blythe cases* the children were held to be legitimated. In the *Munro case*, to avoid the irrevocable rule of bastardy obtaining under the English law, the House

of Lords reached the conclusion of legitimation by what seems to us a refinement of reasoning, which was, in effect, that although by the law of England the child was a bastard when born, the fact that the father was domiciled in Scotland at the time of the birth and that the laws of Scotland recognized legitimation by subsequent marriage gave the child the capacity to be legitimated by the English marriage so as to take property under the laws of Scotland.

The reasoning in the *Munro case* is to some extent and on one phase of the case adopted and followed in the *Blythe case* by the Supreme Court of California. The provision of section 230 of the California code was not that the child should be the heir in case of the public acknowledgment and receiving into the family, but that the father by such acts "thereby adopts it, and such child is thereupon, for all purposes, legitimate from the time of its birth." It will be observed that section does not purport to confer any property right but to declare a certain status of the child, and under that section of the code the *Munro case* was discussed and the reasoning followed. The exact language of section 1387 is: "Every illegitimate child is an heir of any person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child." When the court comes to the consideration of the right under that section it says: "It is unnecessary to decide whether this provision affects the status of a child or whether it is alone a statute of descent. If it either directly or indirectly touches upon the status, our views as herein previously expressed are applicable. If it is a statute of descent pure and simple,—and *Estate of Magee*, 63 Cal. 414, seems to so declare in express terms,—then the plaintiff is entitled to all the benefits of it, regardless of domicile, status or extra-territorial operation of State laws." The above quotation thus clearly points out the distinction between the cases where the status of a child is the question to be determined and the conflicting laws of descent in a given case.

It may be further said of the *Munro case*, while in that case the principle that the domicile of the father in the country where the rule of legitimation *per subsequens matrimonium* is adopted at the time of the birth of the child gives the child capacity to be legitimated by a marriage in the country where that rule does not obtain was given weight, it may well be inferred from the remarks of Lord McKenzie that the decision would have been the same without its application. He said: "I cannot help entertaining doubt whether the indelibility of English bastardy has any meaning beyond this: that an English bastard is not legitimated by an English marriage. * * * But suppose it were true that English bastardy is indelible, not only against a marriage in England, but against a marriage all the world over; I say, suppose there was produced a statute providing and declaring that an English bastard born in England should remain a bastard all the world over, notwithstanding anything that could be done in any country; I ask, could we give it effect? Could we acknowledge the authority of such a statute? I think we will be bound to say that the English parliament might rule the fate of the bastards in England but that its laws were not entitled to extend to other countries, and that there was no principle of the law of nations which would give effect to such a statute."

In the case at bar the statute of Ohio was introduced, and by its provisions, in force at the birth of appellee, the marriage of the father to the mother and the acknowledgment of the child by him legitimated the child, and, if it were deemed essential, we think it might well be held, under the circumstances of this case, that the marriage of William C. Hall to appellee's mother was an acknowledgment of this child during the marriage. He, as the putative father, was arrested, charged with its paternity, and put an end to the prosecution by marrying the mother. The courts will not indulge the presumption, in such case, that the marriage was entered into merely to avoid the possible consequences of the pro-

ceeding, but will rather assume that had the alleged father doubted his paternity of the child he would have resisted the prosecution and refused the marriage. *Brock v. State*, 85 Ind. 397.

While the record does state the conclusion of witnesses or the assertion of the fact by them that the residence of the appellee's father was in Pierceville, Ind., at the time of her birth, it also unquestionably shows by his admission and by other evidence that at the time of his keeping company with appellee's mother, the time of her pregnancy and the time of his arrest he was working in the railroad yards in Cincinnati. He was a single man, and his residence was wherever he wished to make it. As we have said, however, we do not regard this question as controlling. The question here presented is not one merely affecting the civil status, but is a question of descent and heirship of real estate. The descent of property, and real estate in particular, in a state or nation is governed by the law of the situs. (3 Washburn on Real Prop.—3d ed.—sec. 32, p. 16; Tiedeman on Real Prop. sec. 664; *Keegan v. Geraghty*, 101 Ill. 26; *Stoltz v. Doering*, 112 id. 234; *United States v. Fox*, 94 U. S. 315.) In the latter case it is said (p. 320): "It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent or in any other mode, is exclusively subject to the government within whose jurisdiction the property is situated."

Where the question is as to the right to take real estate in this State under our laws of descent, the fact that the claimant may be qualified to take, as heir, under the laws of another State or sovereignty of which he is or has been a citizen, will not enable him to take under the laws of this State unless those laws comply with the terms and requirements of our own law. (*Keegan v. Geraghty*, *supra*; *Stoltz v. Doering*, *supra*.) On the other hand, it cannot be material that the claimant could not inherit under the laws of some other State

or country; if he bring himself within the requirements and provisions of the statutes and laws of this State he may take according to them.

The statute under which appellee claims is section 3 of chapter 39 of the Revised Statutes, and the act is entitled "An act in regard to the descent of property." The section reads: "An illegitimate child, whose parents have intermarried, and whose father has acknowledged him or her as his child, shall be considered legitimate." And under our law, when a child is legitimated he takes under our Statute of Descent, whether that legitimation arises from birth in wedlock or subsequent marriage and acknowledgment of a child born out of wedlock,—in other words, without any distinction as to the rights of inheritance of legitimates. This section, placed as it is, cannot be construed as merely fixing the status of appellee, but is a rule of descent.

A citizen of our State, possessed of real estate in it, has died intestate, and the question is, to whom, under our statute, does his property descend? The law says it shall descend to his children. It recognizes that he may have two classes of children: legitimate children and illegitimate children. It also recognizes that by the doing of certain acts the illegitimate child may become legitimate, and then he will have but one class, and between that class of legitimates there is no distinction of right of descent or inheritance. As we view the law, it is immaterial what the laws of Indiana or Ohio, or any other country, are or were. We look to our own law and read it as it is written; then to the facts, and if the facts bring the claimant within our law then he is entitled to its benefits, whatever may be his status elsewhere. We do not find in our law the requirements that the father shall acknowledge the child during the lifetime of the mother, nor do we find that, in order to make an acknowledgment such as will legitimate the child, the law of the domicile of the father at the time of the birth of the child must have recognized such form of legitimation. In a republic consisting of

as many independent commonwealths as does ours, with each commonwealth invested with the power of determining the rules of descent and heirship within its borders and with the people constantly changing from one to the other, if we should be called upon to determine the rights of descent of real estate in our own State by the legal status of claimants as affected by the laws of other States, any rules that we might attempt to adopt would be both unsettled and uncertain.

It is stipulated in this case that Vallie R. Hall, the widow of the intestate, had a claim allowed in her favor against the estate of her deceased husband in excess of \$6000; that at the instance of appellee the order allowing said claim was set aside by the probate court, and that the matter is pending on appeal in the circuit court. Upon this state of facts the appellant urges that it was error for the chancellor to have decreed partition until the settlement of the estate of the decedent.

The parties in interest in the land are adults. The right of partition is fixed by statute, and where the rights of minors or infants are not involved the court may not refuse to declare the rights of the parties claiming to be owners of the land and decree partition among them according to their rights. (21 Am. & Eng. Ency. of Law,—2d ed.—1146; *Hill v. Reno*, 112 Ill. 154; *Martin v. Martin*, 170 id. 639; *Ames v. Ames*, 148 id. 321; *Trainor v. Greenough*, 145 id. 543; *Wachter v. Doerr*, 210 id. 242.) The appellant, John W. Hall, denied and contested the right and claim of appellee to heirship. He urged her illegitimate birth and denied that she had been legitimated within the requirements of our law. She was not shown on the files of the estate as an heir, and it was proper that she should timely bring and prosecute her suit, which would fix her rights. While the practice is not approved or commended of making actual partition or sale under such proceeding prior to the settlement of estates, we are not prepared to hold, under our statute, that a decree for either is reversible error. The creditor cannot be injured

thereby, for if actual partition is had the lands are still subject to sale, and if a sale in partition is had the purchaser likewise takes subject to the charge of the debts of the ancestor, and the rule *caveat emptor* applies. (*Sutton v. Read*, 176 Ill. 69; *Bassett v. Lockard*, 60 id. 164.) If the owners of these lands could agree and should make partition among themselves no one would question that it would be a good and valid partition, *non constat* the estate of the ancestor is unsettled. The statute points out when partition may be had, and the contents of the bill or petition, so far as the legislative body deemed the same essential, are prescribed. (Rev. Stat. chap. 106, secs. 1, 5.)

Section 1 of chapter 106 expressly confers the right upon those who have derived their title by descent. That can only occur where the ancestor dies intestate and the title passes by operation of law. If it had been the legislative intent that the right should only be exercised by those who derive title by descent after the period allowed by law for the filing of claims against the estate of the ancestor, that intention would have been manifested in some manner or by some language contained in the statute. Nothing of the kind appears, and we can find no warrant for the court reading into the statute additional requirements. Many of the States have by statute prohibited the institution of a proceeding for partition before the expiration of the time within which the estate of decedent should be settled. Not so in this State. Appellant and appellee are the owners of the land charged with the payment of the debts of the ancestor and the widow's rights. As owners they are entitled to the beneficial use of it. If one shall chance to be in exclusive possession at the death of the ancestor and deny the right of the other, it would seem a harsh rule, in the absence of some positive requirement of law, to say his right should be postponed until the settlement of the estate. Here the ancestor died in December, 1900, and the present bill was not filed till September, 1902,—nearly two years thereafter. In June, 1903, the estate was still unsettled, and it is com-

mon knowledge that many estates are four or five years in process of settlement.

It is suggested that the holding in *Wachter v. Doerr*, 210 Ill. 242, is in conflict with the holding in this case as to the right of partition before the settlement of the estate. The decree for partition entered in that case was reversed for the reason that the answer and the evidence disclosed the absence of necessary parties. Upon the question now before us it was there said (p. 245): "In some States a proceeding for partition before an estate has been settled or the time allowed for that purpose has expired has been held to be premature, and in others a suit for partition before that time is prohibited by statute. (21 Am. & Eng. Ency. of Law,—2d ed.—p. 1174.) We have not held that the proceeding cannot be instituted, but have condemned the practice of taking decrees before it can be known whether or not it will be necessary to sell the land to pay debts." We do not think the cases are in conflict.

The chancellor, in case a sale is ordered, should require the administrator of the estate to be brought before the court and control the time of sale, or the funds arising from the same, so that the creditors of the estate may have the benefit thereof.

The decree of the circuit court is affirmed.

Decree affirmed.

WILKIN, CARTWRIGHT and HAND, JJ., dissenting: We adhere to the decisions in the cases of *Sutton v. Read*, 176 Ill. 69, and *Wachter v. Doerr*, 210 *id.* 242, which, as we understand, were not intended as advisory, merely, but as decisions of the court on a question of law and practice.

THE CHICAGO AND JOLIET ELECTRIC RAILWAY COMPANY
v.

SAMUEL SPENCE.

Opinion filed December 22, 1904.

1. EVIDENCE—*proper inquiry as to earning capacity of plaintiff.* In allowing damages for the impairment, by the injury, of plaintiff's ability to work, the proper inquiry is the comparative capacity of plaintiff to earn money at time of and after he received the injury.

2. SAME—*when evidence of prior earning capacity is incompetent.* Proof of the large salary received by the plaintiff ten years before the injury, when he was younger and more capable and was in a different employment, and of his salary in a later employment dependent upon too many collateral circumstances to show his earning capacity at the time of the injury, is incompetent.

3. SAME—*X-ray photographs are admissible after proper preliminary proof.* An X-ray photograph or skiograph made by an expert, who testifies that he was regularly engaged in the business of taking such photographs for physicians and that he took the negative and developed the photograph in question and that it was an accurate and correct representation, is admissible in evidence.

4. TRIAL—*jury may take photographs given in evidence to the jury room.* Photographs or skiographs given in evidence may be taken by the jury to the jury room upon their retirement to consider of their verdict.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Will county; the Hon. R. W. HILSCHER, Judge, presiding.

E. MEERS, for appellant.

EDDY, HALEY & WETTEN, and J. L. O'DONNELL, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

An electric car propelled by the appellant railway company, on which the appellee was riding as a passenger, collided with another of appellant's cars and appellee was

injured thereby. He instituted an action on the case in the circuit court of Will county, and on a hearing before the court and a jury was awarded judgment in the sum of \$14,000. This judgment has been affirmed by the Appellate Court for the Second District, and the record is before us on the further appeal of the company.

The collision occurred on the 28th day of March, 1902. The appellee at that time was in the employ of the Inter-Ocean Construction Company as a time-keeper and inspector of poles for electric wires, at a salary of \$125 per month. It was insisted before the jury that because of the injury received during the collision of the cars the appellee had become permanently disabled to labor or engage in the active pursuits of life. Damages were sought for such alleged loss of capacity to earn money in the future. As being proper for the consideration of the jury in arriving at a conclusion as to the pecuniary loss which would be inflicted on appellee by reason of his injuries and disabilities, the appellee was permitted to prove, without objection, that at the time of the collision he was employed as time-keeper and inspector for the construction company and was receiving wages at the rate of \$125 per month; that he had been so engaged since January, 1902,—about three months before he was injured; that for the period of six months immediately preceding he was in the employ of the Sanitary District of Chicago at the controlling works at Lockport, at a salary of \$150 per month; that immediately prior thereto he was engaged, for about one month, in putting in abutments for the Joliet Bridge Company, at a salary of \$125 per month, and that during the period of three months immediately preceding said last employment he was engaged in putting in concrete work for water wheels of an electric light company, at \$125 per month and board, and that for the preceding term of two years he had worked for the sanitary district, inspecting bridges and building abutments and piers, at \$100 per month, and that for some five or six months still prior thereto

he was superintendent of a quarry in Tennessee, at a salary of \$100 per month. Over the objection of the appellant company the appellee was allowed to prove that he was superintendent of the Western Stone Company from 1892 and 1893, at an annual salary of \$2500, and that he remained in that position until 1897, at a salary of \$2100 or \$2250 per annum. Appellee was injured in 1902. His employment as superintendent of the Western Stone Company at \$2500, in 1892, was ten years before he was injured, and the salary of \$2250 received by him as such superintendent, when his employment in that position terminated, was for services rendered in 1897,—five years before he was injured.

The proper inquiry was the comparative capacity of the appellee to earn money at the time of and after he had received the injury. He was at the time of the collision of the age of fifty-three years. The salary that he had enjoyed when superintendent of the stone company, beginning ten years before and ending more than five years before the date of the injury, ought not, we think, have been allowed to be proven. It was remote in point of time, and the employment was different in its nature from that in which he was engaged when injured or had been engaged in for some five years before. He was a younger man and more capable then, and had either abandoned the position of superintendent or had been supplanted by another. The salary he received from the stone company as superintendent from 1892 to 1897 was dependent on too many independent and collateral circumstances to give the jury any correct information as to the value of his earning power or capacity at the time he received the injuries which, as he claimed, deprived him of the capacity to work or earn money. (*West Chicago Street Railroad Co. v. Maday*, 188 Ill. 308.) As such superintendent he received very much larger compensation per annum than when he was injured, or at any time during the period of time immediately prior thereto, while the circumstances were such as to indicate with reasonable certainty the

extent of his ability to command wages and to earn money. The purpose of making known to the jury what salary he had received from the stone company in years past was to enhance the damages to be awarded him for the loss or diminution of his earning capacity for the future. It no doubt had that effect, and contributed to the conclusion reached by the jury that the appellee was entitled to receive the large amount specified in the verdict. The evidence was incompetent and prejudicial.

In *West Chicago Street Railroad Co. v. Maday, supra*, we held that the appellee, who was keeping a coffee and tea store when injured and had been so engaged for five years, could not properly prove the amount of wages he had received when engaged as a worker in wood prior to the time when he engaged in selling coffees and teas, for the reason that he had abandoned the business of working in wood five years before he was injured, and for the further reason that the testimony was too remote and involved consideration of too many independent and collateral circumstances to give the jury any correct information as to his earning power at the time of the injury. We declined, however, to reverse that case, although the evidence was incompetent, for the reason the amount shown to have been earned by appellee as a wood worker was only daily wages of \$2 or \$2.25 per day, and that it was plain, from the competent facts proven in the case bearing on his capacity to earn money at the time that he received the injury, that the incompetent evidence had not enhanced the award of damages. In the case at bar the evidence was incompetent, and it is manifest that the damages were enhanced thereby, to what extent we cannot determine.

As the case may be again heard it is necessary we should consider the insistence that the court erred in permitting the introduction in evidence of a skiograph, or X-ray photograph, of a portion of the chest and body of the appellee. The skiograph was made by an expert, who testified he was

an X-ray expert and was regularly engaged in taking such photographs for physicians; that he took the negative from which the photograph was developed and that he developed the photograph, and that it was an accurate and correct representation, etc. It was intended to show by the skiograph that appellee's heart had been displaced; that the walls of that organ had become thick and that an abnormally heavy tissue had formed on the walls of his heart. The testimony of the X-ray expert who had taken the skiograph tended to show the picture correctly represented the condition of the heart of the appellee. Photographs taken by the X-ray process are admissible in evidence after proper preliminary proof of their correctness and accuracy has been produced. (22 Am. & Eng. Ency. of Law,—2d ed.—755.) We think the testimony of the X-ray expert who made the skiograph was sufficient to justify the court in ruling that the picture should be admitted in proof. Subsequently, when the appellant was introducing testimony in chief, another X-ray expert was produced in its behalf. This witness gave testimony tending to show that the skiograph had not been properly taken, and expressed the opinion that the picture was of little or no value as a representation of the heart and other portions of the body of the appellee. But the court was not asked to exclude the picture because of this adverse criticism, nor do we think the motion to exclude should have been granted had it been interposed.

It was not error to allow the jury to take the skiograph with them when they retired to consider of their verdict. Paragraph 56 of the Practice act (3 Starr & Cur. Stat. 1896, chap. 110, p. 3054,) authorizes "papers read in evidence, other than depositions, may be carried from the bar by the jury." "Papers in evidence" clearly embrace photographs or skiographs offered and received in evidence. One of the definitions of the word "read" given by Mr. Webster is, "to discover or understand by characters, marks, features, etc.; to gather the meaning of by inspection; to learn by

observation." Photographs or skiographs produced in evidence on a trial before a jury are, within this definition, "read" in evidence, and may be taken by the jury on their retirement to consider and determine the cause. 12 Ency. of Pl. & Pr. 591, 592; *Barker v. Perry*, 67 Iowa, 146.

For the reason stated the judgment must be and is reversed, and the cause will be remanded to the circuit court for such other and further proceedings as to law and justice shall appertain.

Reversed and remanded.

THE PEOPLE *ex rel.* Henry Crosby, County Treasurer,

v.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD CO.

Opinion filed December 22, 1904.

This case is controlled by the decisions in *People v. Indiana, Illinois and Iowa Railroad Co.* 206 Ill. 612, and *Cincinnati, Indianapolis and Western Railway Co. v. People*, (*ante*, p. 197.)

APPEAL from the County Court of Mercer county; the Hon. W. T. CHURCH, Judge, presiding.

This was an application made by appellant to the county court of Mercer county, at the June term, 1904, seeking judgment against the real estate of appellee for delinquent taxes of the year 1903. Appellee filed written objections to the town tax of each of the towns of Rivoli, Greene, Mercer, Millersburg, New Boston and Keithsburg, the ground of the objections being that the town tax in each instance was levied for "town purposes," and that such designation of the tax was not sufficient.

The certificate of the levy and the record of the annual town meeting of each of the towns mentioned were introduced in evidence, from which the facts appear as stated in

the objections. Appellant then introduced in evidence the record of the town auditors in each of the towns of Rivoli, Greene, Millersburg and Keithsburg, showing by certificates contained therein that at the meetings held by the auditors in each town in September, 1902, and March, 1903, certain claims against the town had been allowed by the auditors, and certificates made to that effect, except in the case of the town of Keithsburg, where the record introduced showed a certificate made at the March meeting only. The appellant was then permitted, over the objection of appellee to amend the certificate of levy made by the clerk of the town of Greene, by inserting therein the following words: "And I also certify that the board of town auditors of the town of Greene aforesaid have certified to me and have filed in my office certificates during the past year of claims and demands audited by them in the aggregate amount of six hundred and forty-two dollars and eighty-five cents (\$642.85)," and a like amendment over like objection was made of the certificate of levy of the town tax of each of the towns of Rivoli, Millersburg and Keithsburg; and the appellant then sought judgment against the real estate of appellee for such sum as appellee's property would bear as its *pro rata* share of a town tax in each town equal in amount to the sum shown by the amendment to have been certified by the auditors of that town. The court, however, sustained the objections, and refused judgment, and the case comes here by appeal.

It is urged by counsel for the People that the certificates found in the record of the town auditors were, in each instance, a proper basis for certifying such a tax levy as is made to appear by the amended certificate of levy. An inspection of these certificates found in the record of the board of town auditors does not show that they were made as a basis for a tax levy. There is no language in either certificate to indicate that it was the purpose of the auditors to have the amount of claims audited certified to the county

clerk to be extended as a town tax. Each was apparently made for the sole purpose of authorizing the payment of the claims which it is certified were allowed. For aught that appears in the record in this cause, there may have been funds in abundance in the town treasury to meet the claims audited, and such claims may have been paid prior to the time the town clerk's certificate of levy was originally filed in each instance.

It is also urged by appellant that a levy to meet the ordinary expenses of the town, such as salaries of town officers, election expenses, etc., cannot be included in the levy made by the electors at the annual town meeting, but that such expenses, after being audited, must be met by a tax, certified by the town clerk, based upon the auditors' certificate; and that this presents an additional reason for holding that a judgment should have been entered for town taxes extended in accordance with the four amended certificates of levy.

WILLIAM J. GRAHAM, State's Attorney, for appellant.

MCARTHUR & COOKE, (CHESTER M. DAWES, of counsel,) for appellee.

Per CURIAM: Questions arising upon the assignment of error attached to this record have been determined by this court adversely to the contentions of appellant in the cases of *People v. Indiana, Illinois and Iowa Railroad Co.* 206 Ill. 612, and *Cincinnati, Indianapolis and Western Railway Co. v. People*, (*ante*, p. 197.) To again discuss them would be profitless.

The judgment of the county court will be affirmed.

Judgment affirmed.

MILLIE JONES *et al.*

v.

MATILDA JONES *et al.*

Opinion filed December 22, 1904.

1. **DEEDS**—*grantor's children cannot avoid his deed for grantor's own improper acts.* Children of a grantor can avoid his deed by showing it was obtained by fraudulent practices or undue influence of the grantee, but neither the grantor nor those in privity of estate with him can set aside his deed upon the ground that such grantor acted fraudulently.

2. **SAME**—*services rendered by grantee constitute legal consideration.* Services rendered by the grantee to the grantor in keeping house and caring for his children constitute a legal consideration for the deed.

3. **SAME**—*when a conveyance is not in fraud of rights of prospective wife.* A conveyance shortly before the grantor's marriage cannot be deemed in fraud of the rights of the prospective wife, where it was based upon a fair consideration.

4. **SAME**—*voluntary conveyance may not be in fraud of rights of prospective wife.* A voluntary conveyance from a parent to child, shortly before the grantor's re-marriage, is not necessarily in fraud of the dower rights of the prospective wife, if there was no actual intention to defraud and the grantor still has a reasonable amount of property.

5. **HOMESTEAD**—*test of a homestead right.* Before the right of homestead can attach, the person through whom the right is claimed must have had such an interest in the property at the time of his death as could be sold on execution to pay his debts.

6. **SAME**—*wife acquires no homestead in land held by husband as a tenant at will.* If, after the delivery of a deed to land to his daughter without restriction or reservation, the grantor re-occupies the land and remains thereon as a tenant at will, his wife acquires no homestead rights in the land, even though he puts improvements on the property.

7. **LIMITATIONS**—*what cannot be relied upon as color of title.* A deed to the grantor purporting to re-invest him with title to land after he has conveyed the same, by a general warranty deed, to another person, inures to the benefit of the latter, and cannot be relied upon by the grantor, or any person claiming in privity with his estate, as color of title.

8. WITNESSES—*when the co-defendants are competent witnesses.* The fact that certain brothers and sisters of the defendant to a bill by the widow and heirs to set aside a deed are made co-defendants does not prevent their testifying as witnesses for their co-defendant if their interests are in fact identical with those of the complainants and adverse to those of their co-defendant.

APPEAL from the Circuit Court of Wayne county; the Hon. JAMES A. CREIGHTON, Judge, presiding.

ORGAN & ELLIOTT, for appellants.

JOHN R. HOLT, and WILLIAM T. BONHAM, for appellees.

Mr. CHIEF JUSTICE RICKS delivered the opinion of the court:

A bill in chancery for partition and assignment of dower and homestead was exhibited in the circuit court of Wayne county by Millie Jones, Mabel Jones and Sarah Jones, (the latter two being minors and appearing by next friend,) against Matilda Jones, George C. Jones, Lewis S. Jones, William D. Jones, John A. Jones, Jane Riggs and Mary Scott, and to set aside two certain deeds made by John G. Jones to said Mary Scott.

The bill alleges that John G. Jones died November 19, 1902, seized of the east half of the north-west quarter of section 24, township 1, north, range 9, east of the third principal meridian, and other lands; that the land above specifically described was the homestead of said decedent at the time of his death, and that he derived title to said homestead tract by purchase, and by open, notorious, exclusive, continued, actual possession as the homestead of himself and family and claiming to be the owner thereof, and the payment of taxes for seven years and by possession for twenty years; and further alleging that after the death of the decedent the defendant Mary Scott placed of record two deeds purporting to convey to her the said tract of land in controversy, alleging that said deeds were never delivered by the grantor

in his lifetime and that no consideration was given for them, and that they were fraudulent and void and a cloud upon the title of said decedent and his legal heirs; avers that each of the heirs, parties complainant and defendant to the suit, is entitled to a one-ninth interest in the lands, subject to the dower and homestead rights of Millie Jones, the widow; that after the making of said deeds the said grantor for many years continued to occupy said lands and used and treated the same as his own and made lasting and valuable improvements thereon, and that shortly after the making of the last of said deeds, dated October 2, 1886, he married appellant Millie Jones; that he secretly withheld from her the knowledge that such deeds were made, and that said last named deed was a fraud upon her rights.

All of the defendants to the bill except Mary Scott defaulted. Mary Scott answered the bill, denying that her father, John G. Jones, died seized of the tract of land particularly described hereinabove, and which is the only land in controversy in this proceeding, and averring that at the time of his death she was the owner in fee of said land; that the deeds were regularly made and delivered to her, and that the consideration therefor was her personal services rendered to the grantor, as his house-keeper, for seven years between the time of the death of his second wife, in 1879, and the marriage to appellant Millie Jones, and also the educating, rearing and clothing the children of the said grantor after his marriage to the said Millie Jones; that appellant Millie Jones knew, at the time of her marriage, that said John G. Jones did not claim title to the lands in question, and that at that time he had his homestead on other lands which were actually occupied by him and which were afterwards traded for a mill, in the conveyance of which appellant Millie Jones joined, and that said mill property was afterwards traded for a large amount of lands in the State of Kansas, and denying all manner of unlawful combination, confederacy or fraud.

To this answer replication was filed, and the cause was heard in open court before the chancellor, who entered a decree finding the title to the property in controversy in Mary Scott, and dismissed the bill as to that tract and decreed partition and the assignment of dower as to the remainder of the property. From this decree complainants below prosecute this appeal, and insist that the decree is contrary to the evidence and that the court admitted improper evidence.

It appears from the evidence that the decedent, John G. Jones, was married three times and had children by each wife; that appellee Mary Scott was a child of his first wife and that there were other children of that wife; that said Mary Scott had been married to one Phelps, and was a widow on January 31, 1879, the date of the death of the second wife of her father; that at that time decedent owned a number of tracts of land; that by the death of his second wife the decedent was left with some four or five minor children; that one of these was a little boy, George, about three years of age, another a daughter, Tillie, who was six years of age, and there were two sons, John and William, who were still older, there being five children at home with the father besides appellee Mary Scott; that Mary Scott, upon the death of the mother, became his house-keeper and kept house for him for seven years or over, and until his marriage with appellant Millie Jones. On the 17th of February, 1879, and shortly after the death of his second wife, decedent gave to Mary Scott, duly executed and acknowledged, a warranty deed for the south forty acres of the tract in question. At that time Mary Scott had a horse and some little personal property, which were sold, and with the proceeds and money belonging to decedent, during the year 1879 a house was built upon this forty acres that had been deeded to her, and the decedent and said Mary and the children moved into this new house and occupied it until 1885, when it burned down, and they then moved on to a farm of the decedent known

as the Fishel place, where they remained until the decedent married appellant Millie Jones, on November 7, 1886. On October 24, 1886, the decedent made and delivered to Mary Scott, by the name of Mary E. Phelps, her then name, a deed to the north forty acres of land, which was about two weeks prior to his marriage with appellant Millie. The latter had three children by a former marriage, and for reasons that seemed sufficient to the decedent he arranged with Mary Scott to take his two smaller children, George and Tillie, to the little town of Mount Erie, within two or three miles of the farm, and rear them, and she did take these two children and took possession of an old dilapidated house on a town lot in that village and with her own means and earnings fixed up the house, and kept, clothed, fed and schooled these two children, and a considerable portion of the time kept one or both of the older sons of the decedent. The daughter Tillie was in delicate health and could not work, and was given not only an education in the ordinary branches, but was given a musical education. It is also shown that at various times Mary Scott paid money to creditors of her father and loaned and gave him money for various purposes. Soon after his death she placed the deeds of record. A number of years before his death, having traded his other lands for a mill, the decedent moved on to the lands of Mary Scott and occupied them with his family until the time of his death. He seems to have received all the rents or income from the lands and to have paid the taxes and put certain improvements on them, namely, a house worth \$150, a barn worth \$300, a granary worth \$50 and \$12 worth of fence, and did some clearing upon the land. That was the extent of the improvements, as appears from the evidence, made by him during the time he occupied it, which was some eight years. The south forty is shown to have been of the value of about \$600 at the time of the conveyance of it. We are unable to determine from the record the value of the north forty at the time of the conveyance of it, in 1886. Both deeds

are general warranty deeds, and the one to the south forty states a consideration of \$500 and the one for the north forty states a consideration of \$600. There is no evidence in the record as to the value of the lands retained by the decedent at the time of his marriage, although the evidence shows that he owned two or three other tracts of land.

With reference to the rights of the children of the decedent, it may be said that they could only set aside these deeds by showing that they were obtained by the fraudulent practices or undue influence of appellee Mary Scott; that she in some manner took advantage of the grantor and thereby induced and obtained the deeds. So far as they are concerned, they are neither purchasers nor creditors of decedent, and he could, as to them, make a voluntary conveyance of all his property to any person he pleased. It is a well established rule that neither the grantor nor those in privity in estate with him can set aside deeds made by him where he acts fraudulently. Nor is there any evidence in this record,—not even the slightest,—that appellee Mary Scott obtained the deeds of which she is in possession through any fraud or fraudulent practice. All the children of the decedent that were old enough to know anything about his affairs knew and understood that the property in question was the property of Mary Scott. It is not even attempted to show that as to the grantor Mary Scott practiced any fraud or exercised any undue influence in obtaining the deeds, but, on the contrary, the decedent stated to various persons that he had made the deeds to her and for the purpose of compensating her for the services she had rendered him. These services are shown to have been worth from three dollars to three dollars and a half per week for the seven and one-half years between the death of decedent's second wife and his marriage to appellant Millie Jones, and the care, custody and support of each of the children during their minority, and for which he was liable, except through the arrangements he made with Mary Scott, are shown to have been worth from

two dollars to three dollars per week, so that, so far as the value, as shown by the consideration expressed in the deeds or any evidence *aliunde*, is concerned, the decedent received full value for these two tracts of land. We have, then, the conveyances for a legal and substantial consideration.

If the conveyances were purely voluntary and without any consideration and for the sole purpose of vesting the title to the property in the appellee Mary Scott, no one concerned in this litigation could complain except the widow, Millie, and she could only complain as to the north forty, which was conveyed shortly before her marriage to decedent; and before she can complain or before the sale can be set aside simply upon the ground that the conveyance was made close to the time of her marriage, it must reasonably appear from the evidence that the conveyance was made in fraud of her rights. Such a conveyance cannot be deemed to be in fraud of the rights of the prospective wife where a fair consideration is shown to have been paid for the conveyance, because if the prospective husband, who conveys, receives the value of the property conveyed, the wife has lost nothing, as he still has its representation in money or money's worth. Moreover, we think it was incumbent upon the appellant Millie Jones to show, that, taking into consideration the entire estate of the decedent at the time of the marriage, the conveyance of this property was prejudicial to her rights. She has not done this. Although the record discloses other property in the decedent at the time of the marriage, she has made no effort to show the value of it or its extent, and, failing to show any express fraud, the implication of fraud, or the fraud that arises, in law, from the mere conveyance, will not be presumed by simply proving the conveyance to a child, which he might properly do if it did not seriously deplete his estate. (*Daniher v. Daniher*, 201 Ill. 489.) But, as we have said, we think there was a sufficient consideration, and that this case does not depend wholly upon the failure of appellant Millie Jones to show that by this

conveyance the estate of the decedent was materially lessened or affected to her injury. The law also recognizes that children are the natural objects of the bounty of the parent, and a conveyance from a father to his child, where he has reasonable property remaining so that the rights of the wife arising from her inchoate dower will not be prejudiced thereby, is not a fraud upon her rights. (*Daniher v. Daniher, supra.*) Of course, if the evidence showed that the conveyance was for the purpose of defrauding the wife and that the grantee in the conveyance accepted it with this understanding, a different question, so far as the widow is concerned, would be presented, but there is not the slightest evidence in this record tending to show any such state of case.

As has been stated, the house in which decedent died was located on the south forty, which was the tract that was conveyed in 1879. It is insisted now that appellant Millie Jones and her children have a homestead right in the land. We think not. She could not, it seems to us, obtain the homestead right or the homestead estate in land that did not belong to the husband and that was held by him as a tenant at will and in which he had no right of homestead. By the delivery of the deed to appellee Mary Scott, without any restrictions or reservations in it, she became entitled to the possession *eo instanti*. If decedent occupied the premises other than by her mere consent there is nothing in this record to show it, and as he does not appear to have had any lease for any of the time, he would be, under such state of facts, a mere tenant at will. The fact that he put certain improvements on this property, amounting to about \$500 in eight or more years' occupancy of it, does not vest the title in him nor does it give to appellants a homestead in the property. The test seems to be, that before the right of homestead can attach, the husband, or person through whom the right is claimed, must have had such an interest in the property at the time of his death as could be sold on execution to pay his debts.

(15 Am. & Eng. Ency. of Law,—2d ed.—556; *Decre v. Chapman*, 25 Ill. 498; *Conklin v. Foster*, 57 id. 104.) If this test be applied, it is clear that the decedent had no such estate in the property in question as that the homestead could attach to it.

The contention that the Statute of Limitations has run and that the decedent had a title adverse to appellee Mary Scott by virtue of possession is not supported by the evidence. There is no evidence that he occupied the land, or any part of it, for twenty years after these conveyances. The south forty, which was occupied by Mary Scott and her father, was vacated in 1885, when the house burned, and he moved to other lands. At that time Mary Scott was in possession with him, and it cannot be said that he was then holding hostile to her rights. Since that time twenty years have not elapsed, and as the deed of 1886 was made less than twenty years ago, of course the supposed twenty years' possession could not be urged in that case.

It is said, however, that in 1875 decedent conveyed this land to one of his sons, John R. Jones, and that in 1880 John R. Jones re-conveyed the same property to the decedent, and that thereby he acquired color of title and paid taxes under the same for seven years. Both of these conveyances were before the conveyance of the last tract from decedent to appellee Mary Scott, and the conveyance from John R. Jones back to the decedent was after the conveyance by the decedent of the south forty to Mary, and any title received by the decedent after he had made and delivered to her a deed with covenants of general warranty would inure to the benefit of the title he had thus made, and such conveyance could not be relied upon by him as color of title, and cannot be by any person now claiming in privity with his estate.

It is insisted that Mary Scott was not a competent witness. All of the material facts that she testified to, except the delivery of the deeds, were established by other competent evidence. She was in possession of the deeds, and there

is no evidence in the record tending to show that she came in possession of them in any improper way.

The objection that the brothers and sisters of Mary Scott were not competent witnesses as against these appellants is not well taken. Their interests were identical with those of the appellants. If the deeds to Mary Scott were set aside they would share in the division of the estate the same as the appellants, and so far as the questions here under consideration are concerned, their interests were hostile to the interests of Mary Scott. The fact that they were made defendants by appellants does not prevent their testifying for Mary Scott, their co-defendant, if their interests were, in fact, adverse to her interest.

In this case the abstract is not indexed, nor is there an index to the original bill of exceptions contained in the record, and we have been obliged, in order to get any understanding of the case, to give the appellants the benefit of the failure to observe our rule and to assume unnecessary and extended labors on our part. We could have properly, and in many cases, have refused to consider appeals where these requirements are not complied with. We have, however, read the abstract carefully, and the greater portion of the record, to ascertain, if we could, if the trial court had fallen into error prejudicial to these minor appellants, and we are unable to say that the conclusions of the chancellor, who tried the case in open court and saw the witnesses, are against the weight of the evidence, but, rather, are impressed that the decided weight of the evidence is for the appellee Mary Scott.

The decree of the circuit court is affirmed.

Decree affirmed.

RICHARD DINGMAN *et al.*

v.

HILLARY BEALL, *et al.*

Opinion filed December 22, 1904.

1. EXECUTORS AND ADMINISTRATORS—*when executor is a trustee.* Where a will devises a distinct part of the real estate to the "executor" in trust, with directions to sell the same and re-invest the proceeds in trust for specified purposes, a sale made by him in pursuance of the directions in the will is a sale in his capacity as trustee, and no bond by him is necessary to the validity of the sale where none is required by the terms of the will.

2. SAME—*section 7 of the Administration act does not apply to executor acting as trustee.* Section 7 of the Administration act, requiring an additional bond by an executor in case it becomes necessary to sell real estate, does not apply to an executor when making a sale in his capacity as trustee under a will devising to him a distinct portion of the real estate in trust, with directions to sell the same and re-invest the proceeds in trust for certain purposes.

3. TRUSTS—*when a sale need not be made within one year.* A trustee directed by the will to sell the trust estate in single tracts or *en masse*, at public or private sale, as soon after the probate of the will as he shall think best, or to lease the lands for one year and postpone the sale, in his discretion, is not obliged to make the sale within one year in order to convey a good title, as such provisions are directory.

4. SAME—*trustee bound to know effect of proposed contest of will on selling price of land.* A trustee who knows of a proposed contest of the will and that the same is a matter of public notoriety is bound to know that the selling price of the land will be depreciated thereby, and if his power of sale is not limited to any particular time and there is nothing calling for haste, it is his duty not to sell the land until he can get an adequate price.

5. SAME—*trustee not obliged to accept inadequate bid because he has advertised the sale.* A trustee having power to sell land at private or public sale, in single tracts or *en masse*, for the best price attainable, is not obliged to accept an inadequate bid by reason of the fact that he has advertised the sale and received bids therefor at the time fixed by the advertisements.

6. SAME—*when sale by trustee is a breach of trust.* A sale of land by a trustee for an inadequate price, at a time known to him to be disadvantageous, is a breach of trust, where there was no necessity for making the sale at that time.

7. EQUITY—*on demurrer to evidence the evidence most favorable to complainants must be taken as true.* Upon disposing of a chancery case upon demurrer to the evidence it is the duty of the court to take as true the evidence most favorable to complainants.

8. SAME—*when refusal to allow amendment is error.* If it is apparent no injury can be done to the defendant by allowing the complainants, before the close of the evidence, to amend their bill by introducing a material matter germane to the suit, it is error to deny leave to amend merely because previous amendments had been allowed.

WRIT OF ERROR to the Circuit Court of Macon county;
the Hon. SOLON PHILBRICK, Judge, presiding.

C. C. LEFORGEE, I. A. BUCKINGHAM, and JACK & DECK,
for plaintiffs in error:

An executor who is also trustee under a will cannot be considered as holding any part of the assets in the latter capacity until he has settled an account in the probate court as excutor, in which he is credited, as executor, with the amount which he holds as trustee; and such account should not be allowed by the judge of probate without requiring him to give bond for the faithful performance of his duties as trustee. *In re Estate of Higgins*, 28 L. R. A. 121.

Under our statute as it now stands, where a will makes the same person executor and trustee, the executor's bond cannot be construed for the faithful performance of the duties belonging to the trustee. A separate bond should be given by the trustee. *People v. Huffman*, 182 Ill. 405; *Hinds v. Hinds*, 85 Ind. 312; Woerner on American Law of Administration, (2d ed.) sec. 260; *People v. Petrie*, 191 Ill. 497; 28 Am. & Eng. Ency. of Law, (2d ed.) 975; *Daggett v. White*, 128 Mass. 312.

The rule of *caveat emptor* applies to all judicial sales. *Tilly v. Bridges*, 105 Ill. 339; *Shup v. Calvert*, 174 id. 500; *Batchellor v. Korb*, 58 Neb. 122; *Leuders v. Thomas*, 35 Fla. 513; *Huber v. Hess*, 191 Ill. 305; Perry on Trusts, (5th ed.) sec. 770.

Slight irregularities, coupled with inadequacy of price, will set aside a sale. *Smith v. Huntoon*, 134 Ill. 24; *Bach v. May*, 163 id. 550; *Hamilton v. Quimby*, 46 id. 96; *Miller v. McAlister*, 197 id. 78; *Roseman v. Miller*, 84 id. 297.

The sale being made without giving the required bond, is void. *Batchellor v. Korb*, 58 Neb. 122; *Cooper v. Sunderland*, 3 Iowa, 114; *Leuders v. Thomas*, 35 Fla. 518; *Williams v. Morton*, 38 Me. 47; *Tracy v. Roberts*, 88 id. 310; *Campbell v. Knights*, 26 id. 224; Freeman on Void Judicial Sales, (4th ed.) sec. 22.

The burden of proof of fairness of a transaction as between trustee and *cestui que trust* is on the trustee. *James v. Lloyd*, 117 Ill. 597; Perry on Trusts, sec. 428; Hill on Trustees, sec. 581.

Authority given to executors and trustees is a personal trust and must be strictly pursued, and if they transcend their authority in any essential particular their acts are void. *Ventries v. Smith*, 10 Pet. 173.

The trustee should inform himself of the value of the property, if necessary, by the estimate of some experienced person, and if he sells at a grossly inadequate price it is a breach of trust which affects the title in the hands of a purchaser. Perry on Trusts, (5th ed.) sec. 770.

When there is no immediate emergency it would be a breach of trust to force on the sale at a manifestly disadvantageous time. Perry on Trusts, (5th ed.) sec. 771.

The court may allow a bill to be amended on hearing. *Downey v. O'Donnell*, 92 Ill. 559; *Farwell v. Meyer*, 35 id. 40; *DeWolf v. Pratt*, 42 id. 198; *Thomas v. Coultas*, 76 id. 493.

By the demurrer to complainants' evidence the defendants must stand upon the evidence adduced by complainants alone. They cannot, in support of the demurrer, have the benefit of any evidence in their favor produced by a cross-examination of complainants or their witnesses. *Pratt v. Stone*, 10 Ill. App. 633.

It is the duty of a court of equity to supervise, protect and preserve the parties from all fraud, unfairness and imposition. *Coffey v. Coffey*, 16 Ill. 141.

Amendments of hearing are favored by the courts. *American Bible Society v. Price*, 115 Ill. 623.

NELSON & WHITLEY, MILLS BROS., and REDMON & HOGAN, for defendants in error:

Where the will provides for a sale by the executor with the power to re-invest and for the sole purpose of re-investment, execution of the power of sale is not the discharge of a duty as executor but of a duty as trustee. *People v. Huffman*, 182 Ill. 403; *Gammon v. Gammon*, 153 id. 41.

Where a person acts in the dual capacity of executor and trustee it is as if two persons had been appointed to the two offices, and when real estate is given to a person in trust by a will and the same person is also appointed executor he will take the land as devisee from the death of the testator, although the trust is to sell, and he will have nothing to do with the real estate as executor. See Hill on Trustees, (3d Am. ed.) 238.

Where lands are sold for an inadequate price, that, of itself, is not sufficient cause to set aside the sale unless it is so grossly inadequate as to establish fraud. Such sales will not be disturbed, even though the lands were worth one hundred per cent more than the sum actually bid for them and for which they were sold. *Comstock v. Purple*, 49 Ill. 159; *Heberer v. Heberer*, 67 id. 254; *Connely v. Rue*, 148 id. 207.

A re-sale will not be ordered unless it has been shown that there has been fraud or misconduct in the purchaser or in the officer conducting the sale or other person connected therewith, or unless it is made to appear that the party interested has been surprised, or led into mistake by the conduct of the purchaser, officer or other person connected with the sale. *Barling v. Peters*, 134 Ill. 606; *Wilson v. Ford*, 190 id. 614.

Public policy requires that there should be stability in judicial sales and that they should not be disturbed for slight causes. *Conover v. Musgrave*, 68 Ill. 58; *Quigley v. Breckenridge*, 180 id. 636.

The granting or refusing leave to amend a bill in chancery after the hearing and before a final decision, being purely a matter of discretion, cannot be assigned for error. *Hoyt v. Tuxbury*, 70 Ill. 331.

Mr. CHIEF JUSTICE RICKS delivered the opinion of the court:

This is a bill filed in the circuit court of Macon county by a portion of the heirs of James Dingman, deceased, to set aside a certain sale, made by the executor or trustee appointed by the will of James Dingman, of certain real estate under the terms of the will.

James Dingman died testate on August 14, 1900, and at the time of his death left surviving him his widow, six children and twenty-five grandchildren, all of whom are parties to this suit, either as complainants or defendants. It appears from the evidence that at the time of his death he was the owner of about one thousand acres of land. The will was dated June 16, 1897, and three codicils were afterwards made, one dated June 16, 1898, the second dated September 1, 1899, and the third November 23, 1899. By his will all of the real estate except about three hundred and twenty acres was disposed of among his heirs. This three hundred and twenty acres not specifically devised was placed in trust under the following conditions:

"*Seventeenth*—To the executor of this my will, hereinafter nominated, and to his properly appointed successor and successors in trust, I give and devise in fee simple all the lands not herein specifically devised of which I may die seized and possessed, in trust, nevertheless, for the uses and purposes hereinafter declared and set forth, and none other; and I hereby give and bequeath to said executor and his successors

in trust all of my personal estate of every description not hereinbefore specifically bequeathed, in trust, nevertheless, for the uses and purposes hereinafter declared and set forth, and none other.

*"Eighteenth—*As soon after the probate of this will my said executor or his successor in trust shall in his discretion, from time to time, in parcels or as a whole at one time, sell the land devised in item 17 of this will upon best terms and for best price reasonably attainable, but not for less than one-third of purchase price to be paid in hand and the remainder on credit not exceeding five years, to be secured by note of purchaser and first mortgage on premises, with interest at six per cent per annum, payable annually, the whole to become due and payable upon default in payment of any interest. Such sale may be either public or private, in the discretion of said executor. Said executor is hereby fully empowered to make conveyance of said lands by deed or deeds, and may in his discretion postpone sale and lease said lands for a term not exceeding one year.

*"Nineteenth—*The funds, principal and interest, from sale of lands, and rents, if any, and personalty, shall constitute a common fund, which said executor shall keep at the best attainable rate of lawful interest, upon real estate first mortgage or invested in bonds of the cities and counties of the State of Illinois or of said State or the United States of America, however always selecting loan or investment at best rate of lawful interest on best available security. Said executor shall collect said interest annually, and upon collection annually divide said interest into eight parts, should my said wife at such time be in life, and pay one equal part to each my said wife and my said sons and daughters."

On September 13, 1900, William J. Lawton was by the county court of Macon county duly appointed executor of said will and qualified as such, and executed a bond in the sum of \$12,000 as executor, conditioned for the faithful performance of his duties as such. No other bond was ever

given by Lawton in connection with the estate. It appears that on the 28th day of March, 1901, the said William J. Lawton, after giving thirty days' notice, sold the land devised to him in trust, at public auction, to Hillary Beall and John F. Beall, who are also made defendants to this suit, they being the highest bidders, for the sum of \$7400.

Three amendments to the bill were filed, the first one on February 19, 1903, and a second on October 27, 1903. A third amendment was made on December 11, 1903. The second amendment was demurred to and the demurrer sustained. The cause was tried in January, 1904, and near the close of complainants' testimony they again asked leave to amend their bill, which was refused by the court. At the close of complainants' evidence the defendants demurred to the same. The court sustained the demurrer and rendered a decree dismissing complainants' bill, and this writ of error is prosecuted from said decree dismissing the bill.

Numerous errors are alleged, part, only, of which have been argued by the respective parties.

The first alleged error argued by plaintiffs in error is, that Lawton sold the land, under the provisions of the will, as executor, and not having given a bond for the faithful performance of the sale the same was void; and that even if the sale was made as trustee, unless an additional bond was given the sale was void, and therefore the demurrer should have been overruled.

We are of the opinion that this sale was made as it should have been, by the trustee. While it is a question, sometimes, where the trustee is also the executor, when the title ceases to be in the executor, as such, and title as trustee begins, yet where there is a separate and distinct part of the estate set apart in trust, as was done in this case, we see no good reason why the trustee could not act in the dual capacity of executor and trustee, holding the personalty as executor and the real estate devised to the trustee, and the proceeds of the sale of the same, in the capacity of trustee, the same as if two

separate and distinct persons had been appointed. At common law, executors, as executors, had no estate in or power over the real estate of their testator, and if an executor has any power, right or interest in respect to the real estate, it must be by virtue of some statute or of the provisions of the will itself. (*Gammon v. Gammon*, 153 Ill. 41.) And while the word "executor" is used in the clauses of the will where directions are made for the sale of the property, the directions, as given, were for the purpose of disposing of a trust estate separate from any other part of the estate, the fee being willed to Lawton in trust, and it was his duty, as trustee, to take charge of the same upon the death of the testator and carry out the trust imposed upon him independently of his duties as executor, and the acts of the trustee need not be void simply because another title is given him other than that of trustee. The sale having been made by the trustee as provided for by the will, cannot be held to be void because no bond as trustee was given, as no bond was required by the will and none is required by the statute.

We are of the opinion that section 7 of the statute on administration (chap. 3) has no application, as this section only applies to administration of estates. And further, county and probate courts have no jurisdiction over trust estates and trustees, they coming under the jurisdiction of a court of chancery, and for this reason it cannot be held the above section of the statute applies to trustees handling trust property.

But the testator, by his will, set aside the lands in controversy for the purpose of creating a special trust fund that should be held for the benefit of his wife and children during their lives, but which, by section 20 of the will, is directed ultimately to rest in his grandchildren. The direction to sell is for re-investment in mortgage security or municipal bonds. The trustee is directed to sell at the best price reasonably attainable, and is not required to make the sale at any particular or stated time. He was authorized to sell in single tracts or *en masse*, and the direction as to time is as soon

after the proof of the will as in his discretion is deemed proper, with power to lease the lands for a year and a postponement of the sale, in his discretion, and to make the sale either public or private. Under these provisions the trustee is not limited to a specific time nor is he required to make the sale within a year. Provisions, such as are contained in this will, as to the time of sale are held to be directory, only, and the sale and good title could be made after the lapse of one year. (Perry on Trusts, sec. 490, p. 771; *Pierce v. Gardner*, 10 Hare, 287; *Smith v. Kinney*, 33 Tex. 283.) As the purpose was re-investment for the creation of what may be termed a permanent fund, there was nothing in the purpose or object of the sale calling for haste.

The trustee had been advised that the will under which he was acting would be contested, and also knew that the proposed contest was of public notoriety. Knowing, then, these matters, he must, as a reasonable man, be held to have known that such proposed contest, and the publicity thereof, would necessarily, or at least reasonably, depreciate the market value of the lands, whether sold at public or private sale, until such dispute or contest was terminated. The trustee also knew that any contest of the will must be had within two years from its probate, and as he was executor as well as trustee his relation to the heirs of the testator was such, his information as to the proposed contest being derived from them directly, that he must also have reasonably known that the beginning of the contest would not be postponed until the expiration of the time allowed by statute to bring it, and the bill shows that the contest was, in fact, begun very shortly after the sale. It was the duty of the trustee to sell the land for the best price attainable, and it was his duty to not sell the land, when there was nothing calling for haste, at a time when he knew it would not bring what it was reasonably worth, but that its sale value would be affected by the threatened contest. Under such conditions he must have known that the land would only bring such a price as a buyer was

willing to pay, taking into consideration the hazard of losing the benefit of his purchase as the result of the contest. It must be further borne in mind that although Lawton advertised the land and received bids therefor at the time fixed by the advertisement, he was still under no obligation to make the sale. It was not a judgment sale, but was the sale of the trustee, and the fact that he made advertisement of the sale and proposed to make it public did not change its character or make it other than his sale as trustee, nor require him to accept what he knew to be an inadequate bid.

Upon the question of the inadequacy of price the witnesses varied. The time of the sale was taken as the measure, and the trustee fixed the value at \$9900 while most of the witnesses fixed the value at from \$10,500 to \$14,000, one witness placing it as high as \$16,090. The case was disposed of upon a demurrer to the evidence, and it was the duty of the court, in considering the demurrer, to take as true that evidence most favorable to complainants. If that be done, then the record shows the land did not sell for half its value. With such glaring inadequacy in the price, if the sale, for that reason alone, should not be held a fraud upon the *cestuis que trust*, it at least calls for great scrutiny upon the part of the court of the acts of the trustee in making the sale. Before the sale the trustee had been offered \$8640 for the land, and the party who made the offer testified that he regarded the land then worth \$12,000. The witnesses who testified as to value were residents in the vicinity of the lands. It was the duty of the trustee to inform himself of the value of the property, and if he had gone among these witnesses and made inquiry it cannot be presumed that he would have failed to receive such information as would have prompted him to withdraw the property from sale when the bids made therefor were so disproportionate to its value. It has been held a breach of trust to sell property at a disadvantageous time when there is no immediate necessity for such sale. (Perry on Trusts, sec. 771, and authorities under note 5.)

Here there was no emergency. The time was manifestly disadvantageous and the fact known to the trustee.

Before the close of the evidence for the complainants a motion was made upon their behalf to amend the bill. The proposed amendment alleged that on a certain forty acres of land in controversy there was a cemetery, fenced, and containing from six to ten acres; that about two and one-half acres of said cemetery tract had been deeded by the testator in his lifetime and that the balance of said cemetery tract belonged to the testator at the time of his death; that at the time of the sale the trustee announced that the cemetery was reserved from the sale, and like announcement was made in the public announcement of the sale, and that the trustee, in fraud of the rights of complainants and other heirs, legatees and devisees of the late testator, conveyed to the Bealls the said cemetery tract in addition to the lands offered and sold to them. There was evidence in the record supporting these allegations. Defendants in error did not offer any evidence in the case, and if the allegations of this proposed amendment were true, a fraud was perpetrated upon those interested in this land, which was a part of the trust estate. The subject matter before the court was a controversy relating to a trust, which it is the special province of a court of equity to guard and enforce, and while it is true that the allowing of amendments must be, and is generally, largely committed to the discretion of the court, yet where it is apparent, as in the record before us, no injury can be done the opposing party by allowing the amendment and where the matter proposed to be introduced by the amendment is of a material character and germane to the suit, the court will not be warranted in denying leave to amend simply because previous amendments have been allowed, and the action of the court in such case is open to review upon error. We think the amendment should have been allowed, and that, taking into consideration the disadvantageous time at which a sale was made, the inadequacy of the price and the manifest

wrong shown by the proposed amendment, which would all be considered together in the final determination of the case, the failure to allow the amendment was such an error as should work a reversal of the decree.

The decree will be reversed and the cause remanded to the circuit court of Macon county, with directions to allow the amendment to the bill offered, and for such further proceeding as to law and justice shall appertain.

Reversed and remanded, with directions.

G. W. DAVIS

v.

ANTHONY PFEIFFER.

Opinion filed December 22, 1904.

SPECIFIC PERFORMANCE—*when bill for specific performance can not be maintained.* A contract for the purchase of land, from which it appears that the land has been sold to two persons and that the conveyance is to be made to both, cannot be made the basis of a bill by one to compel conveyance of entire title to that one.

APPEAL from the Circuit Court of St. Clair county; the Hon. R. D. W. HOLDER, Judge, presiding.

W. L. COLEY, and D. J. SULLIVAN, for appellant.

Mr. JUSTICE SCOTT delivered the opinion of the court:

This was a bill filed in the circuit court of St. Clair county by Davis to reform a written instrument, which he regards as a contract for the sale of real estate, and to compel the specific performance of the contract as reformed. Pfeiffer was the sole defendant. A hearing was had before the chancellor upon bill, answer and replication. The bill was dismissed for want of equity, and Davis appeals.

The instrument in question, as signed, is in the words and figures following, to-wit:

"EAST ST. LOUIS, *May 21, 1903.*

"Received of G. W. Davis and H. A. Vrooman \$200, to be applied to part payment of the purchase price of the following described real estate, situated in St. Clair county, Illinois, to-wit: The S. W. quarter of the N. E. quarter and W. half of N. W. quarter of N. E. quarter of Sec. (28), containing 60 acres, lot 16a containing 34.63 acres, acquired by Francis Parady, by deed recorded * * * lot 15 containing nine acres; lot 17, containing 30 acres * * * all of said lots being in the south half of section 28, as platted and recorded, plat book A, 256; lot 1 *or* 2 in the division of Nick Toupenot's land, as platted in the office of the circuit clerk of said county, chancery record 'F,' 341, being part of the S. W. quarter of said Sec. 28; * * * also the N. W. fractional quarter of Sec. 33, containing 22.88 acres; all of said land being in township 2 north, range 9 west, aggregating about 162 acres. At the price of \$15,000, on the following terms, namely: \$800 in thirty days, and \$1000 in ninety days thereafter; balance of \$13,000 to be secured by mortgage on said property with satisfactory release clauses. Mortgage to run three years from date at five per cent. Present rents or crop to be adjusted to June 1. The purchaser to pay taxes of 1903. Title being good, failure of said purchaser to make payments as above required, this contract to be void and the above payment to be forfeited, time being the essence of this contract, and upon a failure of the undersigned to deliver good title to the said property within the time above specified, then the above payment shall be returned.

ANTHONY PFEIFFER,
G. W. DAVIS."

The bill, which was filed by Davis alone, avers that the word "*or*," which we have above italicized in the instrument, was written therein, by a mistake of the scrivener, instead of the word "*and*," which should have been there written. The reformation sought is the substitution of the word "*and*" for that word "*or*."

The bill represents that Davis made tender, at the proper place and times, of the \$800 which was to be paid in thirty days, and of the \$1000 which was to be paid in ninety days, but that Pfeiffer was not present, nor was anyone present representing him, to receive the money so tendered, and that after the time of the making of the second tender Pfeiffer refused to carry out the terms of the written instrument, and the bill tenders into court \$1800 the first two deferred payments, prays that Pfeiffer be decreed to convey the premises

to Davis by a good and sufficient deed of conveyance, and the complainant offers by the bill to specifically perform the agreement on his part.

In considering this case we have not had the assistance of brief or argument on behalf of appellee. There is difficulty in determining from this contract whether Pfeiffer, individually and alone, agreed to convey any real estate. The document recites the payment by Davis and Vrooman of \$200, and provides that upon the failure of the "undersigned" to deliver good title within the time fixed, then the above payment shall be returned. Pfeiffer and Davis both sign it, and are both comprehended by the word "undersigned." It therefore appears that Davis and Vrooman have paid \$200 to Pfeiffer and Davis, and Pfeiffer and Davis agree that if they fail to deliver good title, then they will return to Davis and Vrooman the payment made.

Other uncertainties appear on the face of this document, but we prefer to place the decision of the cause upon another ground. The instrument does not expressly provide to whom the title is to be conveyed or who the purchasers are, and not being definite in that respect, we can only infer from its language that the purchasers were Davis and Vrooman, and that the title was to be conveyed to both. There is nothing in the terms of the writing from which any conclusion can be drawn that they did not contribute equal amounts to the payment of the \$200 that was paid down, or that they were not equally bound for the payment of the deferred payments, or that they were not equally interested as purchasers in the transaction.

It is too plain for argument that where a contract for the purchase of real estate recites that the real estate has been sold to two persons, and that the conveyance is to be made to both that a bill cannot be maintained by one to compel the vendor to convey the entire title to that one.

The decree of the circuit court will be affirmed.

Decree affirmed.

CHICAGO NORTH SHORE STREET RAILWAY COMPANY *et al.*

v.

HENRY STRATHMANN.

Opinion filed December 22, 1904.

1. INSTRUCTIONS—*repetitions of instructions need not be given.* It is not error to refuse an instruction substantially repeating the principles announced in other instructions which have been given.

2. SAME—*when refusal of an instruction is not reversible error.* Refusing to instruct the jury that if they find the plaintiff is not entitled to recover they will not have occasion to consider the character or extent of his injuries is not reversible error, where they have already been instructed to find the defendant company not guilty if they believe it was not negligent.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

This is an action on the case brought by Henry Strathmann, appellee, against the Chicago North Shore Street Railway Company and the North Chicago Electric Railway Company, the appellants, to recover damages for personal injuries.

The accident occurred on Evanston avenue, a public highway leading from the city of Chicago to the city of Evanston, and within a short distance of Lawrence avenue, about nine o'clock on the morning of September 11, 1897. On Evanston avenue appellants have a double track extending north and south, and at this point the avenue was unpaved and there were ditches from four to six feet deep on either side of the car track. Appellee was driving south in a one-horse wagon, and was thrown to the ground by a south-bound electric car striking the rear end of his wagon.

There is an irreconcilable conflict in the evidence as to the manner in which the accident occurred. The evidence on behalf of appellee was to the effect that he had been driving upon the south-bound track for several squares when the car

came up behind the wagon without any warning. On the other hand, the evidence on behalf of the appellants tends to show that before reaching the place of the accident the appellee was driving upon the north-bound track, and just at the time of reaching the place of the accident he suddenly turned out and into the south-bound track almost directly in front of the car; that the motorman rang his bell and called to appellee; that at the time the car struck it, the wagon was almost in the south-bound track and the horse was headed east, thus indicating that appellee was trying to swing out of the south-bound track into the north track at the time he was struck.

Upon a trial before the court and a jury judgment was rendered in favor of appellee for \$5500, which has been affirmed by the Appellate Court for the First District, and a further appeal has been prosecuted to this court.

JOHN A. ROSE, and HENRY W. BRANT, (W. W. GURLEY, of counsel,) for appellant.

WILLIAM A. DOYLE, for appellee.

MR. JUSTICE WILKIN delivered the opinion of the court:

The grounds relied upon by appellants for reversal are three, all arising upon instructions. The first objection is to the eighth of those given at request of plaintiff, as follows:

"If the jury believe, from a preponderance of the evidence in this case, that the plaintiff, while in the exercise of ordinary care, was injured by or in consequence of the negligence of the defendants as charged in the declaration, then you may find the defendants guilty."

The contention is, that it limits the duty of appellee in the exercise of due care to the time of the accident, although the main question at issue was whether the appellee was guilty of contributory negligence in turning into the track near the approaching car. In support of this contention sev-

eral authorities are cited to the effect that it is improper to give an instruction which limits the question of due care to the conduct of the plaintiff at the time of the injury, regardless of his conduct in placing himself in the place of danger. We do not think the objection to this instruction well taken. The instruction does not limit the exercise of ordinary care to the exact time of the injury, but tells the jury that if the plaintiff, while in the exercise of ordinary care, was injured, etc., which time or ordinary care could reasonably be applied to the entire accident or occurrence rather than to the moment of the injury. Even if the objection to the instruction should be sustained, it was cured by others given. The first given on behalf of the plaintiff told the jury that the question whether or not the plaintiff exercised ordinary care for his personal safety, before and at the time of the occurrence of the injury complained of, was a question of fact to be determined by them, and the fifteenth given at the request of the defendants directly called the attention of the jury to the conduct of appellee before the accident, and told them that if, immediately prior to the time of the alleged accident, the plaintiff turned his horse from the north-bound track into the south-bound track immediately in front of the defendants' approaching car, without looking to see if a car was approaching and without paying attention as to whether the car was approaching, he could not recover. These instructions, taken together, fully informed the jury as to the rights of the plaintiff and the duty of the defendants, and it cannot be held that the eighth in any way injured or prejudiced the rights of appellants, even though inaccurate.

Complaint is next made of the refusal of the ninth instruction offered by the defendants. It was to the effect that if, immediately prior to the accident, plaintiff was driving his horse on the north-bound track and he was then at a safe distance from the car, then the defendants' servants operating said car would not be bound to slacken the speed in anticipation that the plaintiff might possibly suddenly turn his

horse in front of the car; that the motorman would under such circumstances be required to slacken the speed of his car only when it became apparent to him, in the exercise of ordinary care on his part, that the plaintiff was about to turn off of the north-bound track into the south-bound track. The substance of this instruction was covered by the fifteenth and twenty-eighth given on behalf of defendants, and while there were some matters contained in the instructions refused which were not contained in the other, they were not so material as to require the giving of the former.

It is finally insisted that the refusal of the defendants' twelfth instruction was reversible error. It is as follows:

"The jury are instructed that if, under the instructions of the court, they find, from the evidence in this case, that the plaintiff is not entitled to recover, then they will not have occasion to consider at all the character or extent of plaintiff's injuries, whether serious or slight."

In support of their contention appellants' counsel cite the case of *Chicago Street Railway Co. v. Osborne*, 105 Ill. App. 462. That case, under the statute, would not be authority in this court. It does not, however, hold that the refusal of a similar instruction constituted reversible error. The twenty-first given on behalf of defendants instructed the jury that if they believed, from the evidence, that there was no negligence on the part of the defendants in operating the car at the time and place in question but that plaintiff was nevertheless injured, they should find the defendants not guilty. It contained all that was material and proper to be given in the twelfth refused.

From a consideration of the whole case and all the instructions given we think the jury were fully and clearly informed as to the law applicable to the facts of the case, and that appellants' rights were in no way prejudiced by the giving or refusing of instructions.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

THE GRANT LAND ASSOCIATION

v.

THE PEOPLE *ex rel.* John J. Hanberg, County Treasurer.*Opinion filed December 22, 1904.*

1. TAXES—*failure of assessor to "view" land does not defeat the tax.* Failure of the assessor to view land assessed for taxation is but an irregularity which does not defeat the tax levied on such assessment.

2. SAME—*board of assessors not required to view property it assesses.* Section 12 of the Revenue act does not require the board of assessors of Cook county to actually view the property assessed by it if the same has been viewed by a deputy assessor.

3. SAME—*assessor in town of Cook county is an ex officio deputy for board of assessors.* An assessor elected for a town in Cook county is *ex officio* a deputy to the board of assessors, and his assessments are subject to revision by the board.

4. SAME—*proper person to whom to apply for information as to valuation.* Under section 27 of the Revenue act of 1898 the chief clerk of the board of assessors is the proper person to give information to property owners in Cook county as to the valuation placed upon their property by the assessor or board of review.

5. SAME—*reliance on information from an unauthorized person does not vitiate assessment.* Reliance by tax-payer in Cook county upon information as to the valuation of his property for taxation obtained from the local town assessor instead of from the chief clerk of the board of assessors does not vitiate the assessment, even though he is misled thereby.

6. SAME—*failure to publish list of assessments does not vitiate tax.* Failure to publish a list of assessments in any of the modes provided by the statute does not constitute a valid objection to the application of the county treasurer for judgment of sale.

APPEAL from the County Court of Cook county; the Hon. L. C. RUTH, Judge, presiding.

A. J. REDMOND, for appellant.

JAMES H. WILKERSON, County Attorney, and WILLIAM F. STRUCKMANN, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The appellant association filed two objections to the application of the appellee treasurer for a judgment and order of sale against its lands and lots in the town of Cicero for delinquent taxes alleged to be due for the year 1903. The objections were as follows: (1) "The valuation of objector's property has been raised contrary to law and the provisions of the statute, and to the extent of such increase (thirty per cent) the taxes so extended are illegal and void;" (2) "the valuation of objector's property is illegal, excessive and void, and the taxes extended thereon and for which judgment is sought herein are illegal, contrary to the statute, excessive, null and void."

In 1899 the lands and lots here involved were valued for assessment by Chris. F. Hafner, the assessor for the town of Cicero. The board of review, at, as it seems, the instance of Mr. Hafner and other citizens, reduced the valuations for assessment upon this and other real estate in the town of Cicero thirty per cent for the year 1899. The property was not reassessed until 1903, the beginning of the next quadrennial assessment period. In 1903 James G. Lynn was elected assessor for the town of Cicero and became *ex officio* deputy assessor for the board of assessors in and for the county of Cook. He adopted the valuations of lands and lots which had been made by assessor Hafner for the year 1899, and the lands and lots were assessed for taxation accordingly. W. T. Block was secretary and treasurer for the appellant association in 1903, and he testified that it was his duty to "look after" the assessments of the property of the association for taxation, and that, in pursuance of his duties, he called upon Mr. Lynn, the assessor elect for the town of Cicero, and inquired what valuations had been placed upon the lands and lots of the appellant association as the assessment thereof for taxation for the year 1903; that Mr. Lynn told him he had assessed the lands and lots, and "that the

assessed valuation thereof for taxing purposes would be the same as in the preceding year;" that he (the witness) believed the statement to be true and did not examine the assessor's books but relied upon the information received from Mr. Lynn. A list of the assessment of the property assessed for taxation in the town of Cicero for the year 1903 was not published in any newspaper. The appellant association did not apply to the board of assessors, or to the clerk of said board of assessors, or to the board of review, to ascertain the valuations that had been placed upon the property for taxation or ask for any relief or action upon the part of either of such bodies. Mr. Lynn, the assessor elect for the year 1903, testified that he fixed the valuation upon appellant's property with the understanding that the assessment would be reduced thirty per cent, as had been done at the beginning of the preceding quadrennial term for assessments.

The position of the appellant association is, that it appeared "that the valuation of its property was thirty per cent higher than the true estimate of the valuation thereof by the local assessor; that the officer misrepresented to the appellant that the valuations of appellant's property were the same as for the preceding year, when, as a matter of fact, they were thirty per cent higher; that the year 1903 was the fourth year, and the board of assessors failed to publish the list of assessments as provided by statute; that therefore such a fraud was committed upon the appellant as to make the tax levied against its real estate in the town of Cicero illegal and void."

It was stipulated that "no member of the board of assessors or board of review, except the deputy assessor of the board of assessors, viewed said property for the purpose of making said assessment." It seems to be urged that it was the duty of the board of assessors or of the board of review to "view" all real estate which it assessed for taxation, and that the failure to perform this duty vitiates the tax. This question last stated may conveniently be first determined.

Section 12 of chapter 120, entitled "Revenue," (Hurd's Stat. 1899, par. 306,) provides that the assessor, by himself or by his deputy, shall actually view and determine, as near as practicable, the value of each tract or lot of land listed for taxation. The requirements of this section are fully met if Mr. Lynn "viewed" the property, and the stipulation concedes that he did so. Moreover, a failure to go on the land and actually view it is but an irregularity, and would not defeat the tax. *DuPage County v. Jenks*, 65 Ill. 275.

Nor do we think appellant's other contentions are well taken. In Cook county, where appellant's lands and lots are situate, assessments for taxation are made by a board of assessors, under the provisions of the act approved February 25, 1898. (Hurd's Stat. 1899, p. 1444.) The assessor, Lynn, though elected in the town of Cicero, was but a deputy assessor, *ex officio*, for the board of assessors, and his assessments were subject to the revision and approval or disapproval of the board of assessors, as were the assessments of those appointed deputy assessors by the board. In *Burton Stock Car Co. v. Traeger*, 187 Ill. 9, we said (p. 17): "It is not clear that the legislature intended assessments in Cook county within the limits of the city of Chicago to be made by one class of assessors and assessments in the county outside of the city to be made by another class. As a matter of fact there is but one class of assessors. The law provides for one board of assessors for the whole county. There are two classes of deputy assessors,—those appointed by the board for the city and those elected for the towns outside of the city. But the difference is only in the fact that one class is appointed and the other is elected. Both are deputy assessors only, and are under the direction and supervision of the board of assessors. The work of both is subject to revision and approval of the board of assessors, and becomes the work of that board when it is revised or adopted by such board."

Section 27 of the said act of 1898 provides that the chief clerk of the board of assessors, "when requested, shall de-

liver to any person a copy of the description, schedule, return or statement of property assessed in his name or in which he is interested, and the valuation placed thereon by the assessor or board of review." The appellant association did not avail itself of the opportunity thus provided by the statute for obtaining information as to the valuation of its property for assessment, and the record discloses no reason or excuse for the failure so to do. Had this information been sought from the chief clerk of the board of assessors, any error or over-valuation could have been reviewed or corrected. The appellant was required to employ this opportunity to acquire information as to the assessment of its property, and could only rely on other information at its peril. This principle was declared in *Porter v. Rockford, Rock Island and St. Louis Railroad Co.* 76 Ill. 561, and in *Humphreys v. Nelson*, 115 id. 45. That the appellant association sought information from some other official than the one designated by the law to give it, and was misled, could have no effect to vitiate the assessment. The board of assessors, by section 23 of the said act of 1898, are expressly vested with the power of revising all assessments of real property in Cook county and are required to enter all changes and revisions made by them on the assessment books, and, when such revision has been completed, are required to append to each of such assessment books the affidavit required by law, signed by at least two members of the board, and the section further provides that upon the signing of such affidavits the board of assessors shall possess no further power to change or alter the assessments. The local assessor could have no official knowledge of the assessment as finally completed, and property owners cannot be heard, in defense of an application for judgment against their lands for unpaid taxes, to urge that they relied upon statements made by the local assessor as to the valuation placed upon their property for the purposes of taxation.

The failure to publish the assessments in any of the modes provided by the statute does not constitute a valid objection to the application of the county treasurer for judgment. Section 29 of the act of 1898 (Hurd's Stat. 1899, par. 323, p. 1451,) expressly so provides.

It is not improper to add that we do not find in the record any testimony tending to show that the property of the appellant association was assessed above its value.

The judgment is affirmed.

Judgment affirmed.

J. EDWARDS THOMAS

v.

THE FIRST NATIONAL BANK OF BELLEVILLE.

Opinion filed December 22, 1904.

1. GAMING—*when endorsement of certificate of deposit is void.* Under the Criminal Code an endorsement of a certificate of deposit in a bank is void where the consideration for the endorsement is an agreement to pay the endorser a share of the profits made by using the proceeds of the certificate in gambling on races.

2. SAME—*when defense of illegal consideration should be interposed by bank.* If the endorser of a certificate of deposit in a bank stops payment upon the ground that the consideration for the endorsement was a gambling one, it is the duty of the bank, when sued on the certificate by the endorser, to interpose the defense of illegal consideration.

3. SAME—*what is a gambling transaction.* Investing money with a firm engaged in book-making, pool selling and betting on horse races is a gambling transaction, although the investor is termed a depositor, to whom the firm guarantees the right to share in the profits of the business to the extent of two per cent a week on the sum deposited and to withdraw the deposit at any time.

4. SAME—*courts will not aid in enforcing an illegal contract.* Courts will not aid in enforcing a contract which is part of a gambling transaction, but will leave the party in the position he has placed himself.

5. CONFLICT OF LAWS—*court will not enforce foreign contract against its laws.* Comity between States does not require a court

to enforce a contract against its laws or against its public policy even though the contract is lawful in the State where it was made.

6. PRACTICE—*filing two briefs for same party is a violation of rule 15.* Filing separate briefs and arguments by the different attorneys appearing for the same party is a violation of rule 15 of the Supreme Court.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of St. Clair county; the Hon. B. R. BURROUGHS, Judge, presiding.

This is an appeal from the Appellate Court for the Fourth District to reverse a judgment in that court in favor of appellee, against appellant, in an action of assumpsit upon a certificate of deposit issued by the defendant to one J. F. Wassell and endorsed by him to plaintiff.

The evidence shows that the firm of E. J. Arnold & Co. had their principal office in St. Louis, Mo., where from September, 1902, until February, 1903, they were engaged in the business of book-making, pool selling and betting on horse races. They had branches of their business in Chicago, Harlem, Hawthorn, Washington, D. C., and other places, and sold pools on various race tracks throughout the country. They also had a breeding farm in Illinois, upon which they claimed to raise horses. They sought customers throughout the country, but the customers did not do individual betting or buying pools, but were called depositors. They placed certain amounts of money in the hands of Arnold & Co., and were by them guaranteed the right to share in the profits of the business to the extent of two per cent per week on all sums deposited and to withdraw the original deposit at any time. The appellant, with full knowledge of the character of the business carried on by Arnold & Co., in September, 1902, engaged with them to open a branch office in Washington, D. C., and there solicit deposits from persons willing to invest in the business. He was to remit the deposits to Arnold

& Co. and receive ten per cent of all money thus secured as his share or compensation. He operated that branch office during the existence of the firm of Arnold & Co., advertised himself as manager, distributed literature of the firm, and orally and by letter solicited investments, and advocated and advanced the business generally. When he secured a customer it was his custom to deposit the money received in bank and send his individual check to the firm at their principal office in St. Louis, from which was issued a certificate directly to the customer. J. F. Wassell, a printer by trade, engaged in the government printing office in Washington, his home being in Belleville, this State, had his attention called to the flattering reports of the financial success of Arnold & Co., and on January 23, 1903, went to the office of appellant in Washington, D. C., for the purpose of investing a certificate of deposit issued by the appellee bank, payable to him, amounting to \$1335. He was informed by appellant that Arnold & Co. would accept nothing but cash, and it was therefore agreed that appellant should take the certificate himself and issue his check directly to Arnold & Co. Appellant was also to advance \$15 in addition to the \$1335 due on the certificate and send the same to Arnold & Co., provided Wassell should endorse and deliver to him the certificate of deposit and pay the \$15 advanced in cash on the following Monday. The agreement was carried out according to these terms and the certificate endorsed to appellant. On the morning of February 8, 1903, the home office of Arnold & Co. at St. Louis failed to open and the partners absconded. Thereupon Wassell informed the bank of the endorsement and delivery of said certificate of deposit and notified it not to pay the same. The certificate matured the following March, and at the April term of the circuit court of St. Clair county this suit was commenced. A jury was waived and the case tried by the court. On the trial appellant submitted four propositions of law to the court, all of which were marked refused and judgment rendered against the plaintiff for costs of suit.

An appeal was prosecuted to the Appellate Court for the Fourth District, where the judgment of the circuit court was affirmed.

L. D. TURNER, and L. D. TURNER, Jr., (DILL & WILDERMAN, of counsel,) for appellant.

R. W. ROPIQUET, and WINKELMANN & BAER, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court :

It is contended by counsel on behalf of appellant that the certificate of deposit sued on, when endorsed by the original payee, became, in effect, a promissory note, and upon being presented to the bank for payment by the holder, properly endorsed, it was the duty of the bank to immediately pay the same. This, it is said, is so because the title to the certificate was absolutely vested in and became the property of the assignee at the time of its endorsement, and that the only defense which the bank could make to this suit was such as would go to the ownership of the instrument, affecting the title thereto, such as forgery. Conceding the law to be as claimed in all legitimate transactions, it has no proper application to the facts in this case. The defense does question the title of the plaintiff to the certificate of deposit sued on. Section 131 of chapter 38 of our statute provides: "All promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgages, or other securities or conveyances made, * * * where the whole or any part of the consideration thereof shall be for any money, property, or other valuable thing won by any gaming, or playing at cards, dice, or any other game or games, or by betting on the side or hands of any person gaming, or by wager or bet upon any race, * * * shall be void and of no effect." Section 136 of the same chapter provides: "No assignment of any bill, note, bond * * * shall, in any manner, affect the defense

of the person giving, granting, drawing, entering into or executing the same, or the remedies of any person interested therein."

It is insisted by appellant that section 131 above quoted has no proper application to the transaction between the appellant and J. F. Wassell, because the latter, as a customer of Arnold & Co., did not agree to enter into a gambling transaction, but was a mere depositor with them, investing his money in the business of that firm. In the case of *Chapin v. Dake*, 57 Ill. 295, it was held, where a party in possession of two drafts for \$1000 each, drawn in his favor, had lost \$1500 at gaming, endorsed the drafts and delivered them to the winner and received the difference, \$500, in money, under our statute against gaming the endorsement was void and the property in the drafts remained in the payee, and, although in the hands of an innocent holder for value, such endorsement had no more effect than could be given to it provided it had been forged. Under that authority the endorsement made by Wassell to appellant in furtherance of a gambling transaction was null and void and the title to the certificate of deposit remained in the payee. When the suit was brought appellant had no more claim against the bank than if the endorsement had never been made, and it had not only the right, but it was its duty, to question plaintiff's title to the instrument sued upon. (*Williams v. Judy*, 3 Gilm. 282.) It certainly cannot be seriously contended that the business of Arnold & Co. was not that of gambling, so far as they were engaged in book-making, pool selling and betting on horse races, nor that the scheme by which they obtained money from customers was not for the purpose of carrying on that illegitimate business. Their agreement to pay to customers the unprecedented profit of two per cent per week strongly tended to prove that calling them depositors was a mere subterfuge. At least the evidence fairly tended to show that the money which was deposited with Arnold & Co. was nothing more nor less than placing money in their hands to be used

in gambling, two per cent per week to be the depositor's share of the winnings. Whether the transaction was an honest, legitimate one or a mere device to avoid liability under the statute against gambling was a mixed question of law and fact, which has been settled adversely to the appellant by the judgment of affirmance in the Appellate Court. It seems to us unreasonable, under the evidence in this case, to contend that the appellant was a *bona fide* assignee of the certificate. He was the agent and promoter of Arnold & Co. in their gambling transactions and he knew their methods of doing business. Wassell had the right to stop payment on the certificate in order to protect himself against loss. It then not only became the right but it was the duty of the defendant bank to interpose the defense interposed.

It is next insisted that the assignment being made in the city of Washington and the principal office of Arnold & Co. being located in St. Louis, and no law of either the State of Missouri or District of Columbia having been offered in evidence condemning the transaction in those jurisdictions, the assignment should have been sustained and judgment entered for the plaintiff, notwithstanding the statute of this State. The principal office of Arnold & Co. was in St. Louis, but the evidence shows that they carried on their gambling business to a greater or less extent in Illinois. The certificate of deposit was issued by an Illinois bank; the assignor, Wassell, was a resident of this State, and the suit to recover the amount of the certificate was brought by the plaintiff in a court of this State. A contract made in one State, though lawful there, will not be enforced in another where to do so would contravene the criminal laws of the latter or where to do so would be against the express prohibition of its laws. Comity between different States does not require a law of one State to be executed in another when it would be against the public policy of the latter State. No jurisdiction is bound to recognize or enforce contracts which are injurious to the welfare of its people or which are in violation of its own

laws. (*Pope v. Hanke*, 155 Ill. 617; Story on Conflict of Laws, sec. 327.) Therefore, conceding that there was no law in the District of Columbia or in the State of Missouri prohibiting the making of gambling contracts, it was contrary to the laws of this State, where appellant sought to enforce his remedy.

Neither of the propositions submitted by the plaintiff to the trial court announces the law of the case applicable to the facts, as we have already shown, and they were therefore properly refused.

There is another consideration upon which the plaintiff could not maintain this action, if we are correct in the view that it was a part of a gambling transaction. He sought affirmative relief by enforcement of that contract, and the rule is that courts will refuse to aid him in that attempt but will leave him where he has placed himself.

Substantial justice has been done in this case by the judgment of the circuit court and its affirmance by the Appellate Court, and we find no reversible error in the record.

It appears that the appellant in this court is represented by a lawyer who signs his brief and argument as "attorney for appellant." A firm of lawyers also appear for him, and they file a separate and independent brief and argument, which they sign as "of counsel for appellant." The appellee is represented by an individual attorney who files a brief and argument over his name, and a firm of attorneys also appear for it filing another brief and argument on its behalf, so that we have two briefs and arguments on either side of the case. This is a violation of our rule 15, and imposes upon the court the burden of reading and considering more than one brief and argument on behalf of each party. The practice, if adopted, would in many cases require the reading and consideration of a large number of briefs and arguments, limited only by the number of attorneys who happen to be employed in the case. Of course, each counsel has a right to present his views of the case, but by conference and consulta-

tion among themselves one brief and argument should present the respective theories of counsel and be incorporated in a single brief and argument. The impracticability of any other rule will be readily recognized by the profession.

Judgment affirmed.

LUCIUS G. FISHER *et al.*

v.

THE CITY OF CHICAGO.

Opinion filed December 22, 1904.

1. SPECIAL ASSESSMENTS—*objections must be so made as to show on what points the decision is asked.* Objections to a special assessment must be made in such a manner as to show upon what points the decision of the county court is desired, and to enable the petitioner, if it can, to obviate the objections.

2. SAME—*objections not made in county court are waived.* Objections to the confirmation of a special assessment which the county court has jurisdiction to hear and determine are waived if not made in that court.

3. SAME—*objection to jurisdiction of subject matter cannot be waived.* An objection that the county court has no jurisdiction of the subject matter cannot be waived and may be raised for the first time on appeal.

4. SAME—*judgment by court having no jurisdiction of subject matter is a nullity.* A judgment rendered by a court having no jurisdiction of the subject matter is a nullity, since consent cannot give such jurisdiction, and a lack thereof may be taken notice of by the court of its own motion.

5. SAME—*when objections cannot be considered on appeal.* All objections to a special assessment which do not go to the jurisdiction of the court over the subject matter are waived and cannot be considered on appeal, although embraced in the objections filed, if no exception was preserved to the ruling of the court thereon.

6. SAME—*pumping station and system of sewers are a local improvement.* A pumping station for sewage, and a system of sewers in connection therewith covering but a portion of a city, are a local improvement which may be constructed by special assessment.

7. COURTS—*one county judge may hear legal objections and another try question of benefits.* It is no objection that the regular

judge of the county court heard the legal objections to a special assessment and set the objections to benefits down for trial at a future time, at which time the county judge of another county tried the objections to benefits, since county judges may act for each other.

8. SAME—*Supreme Court will take judicial notice of who are county judges.* The Supreme Court will take judicial notice of the fact that the acting judge who tried the question of benefits in a special assessment case in place of the regular judge was the county judge of another county in the State at the time.

APPEAL from the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

N. W. HACKER, and WM. J. DONLIN, for appellants.

ROBERT REDFIELD, and FRANK JOHNSTON, Jr., (EDGAR BRONSON TOLMAN, Corporation Counsel, of counsel,) for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The county court of Cook county confirmed a special assessment against property of appellants, levied to defray the cost of constructing a sewage pumping station, including buildings, machinery and appurtenances, and an extensive system of main sewers connected therewith, to be laid in the streets of a part of the city of Chicago, and from the judgment of confirmation this appeal was taken.

The errors assigned which are relied upon in this court are, in effect,—first, that the estimate of the engineer submitted by the board of local improvements with the ordinance is not sufficiently itemized; second, that the ordinance fully describing the improvement varies from the estimate and includes some things not embraced in such estimate; third, that the ordinance does not sufficiently prescribe the nature, character, locality and description of the improvement; fourth, that the ordinance will require future legislation of the city council to make it operative; fifth, that the improvement is not a local improvement for which a special

assessment can be levied but is one which must be paid for by general taxation; sixth, that the judge before whom the question of benefits was heard was without jurisdiction to hear the same; seventh, that the superintendent of special assessments, being an employee of the city, was an interested person, not legally qualified to make the assessment and to apportion benefits between the city and property owners, and that the act authorizing him to do so is void.

None of these objections was presented to the county court. The abstract contains numerous objections which, with two exceptions, could not possibly include any of the objections now made, and the remaining two were of the most general character, to the effect that there was no valid ordinance authorizing the assessment and that the proceedings were not in accordance with the statute, with no hint of any objection now raised. Section 46 of the Local Improvement act provides that any person interested in any real estate to be affected by an assessment may appear and file objections. By section 48 all objections, except as to benefits, are to be heard by the court, and by section 49, if there is an objection as to benefits it is to be tried by a jury, unless a jury shall be waived. (Hurd's Stat. 1899, pp. 372, 373.) An appeal is allowed for the purpose of reviewing the decision of the county court upon the objections filed, and if that court has jurisdiction of the subject matter, the party appearing there must present his objections to that court. Objections must be made in such manner as to show the point on which a decision is asked and to enable the opposite party to obviate the objection, if it can be done. The county court is not charged with the duty of searching for objections which are not pointed out, and an objection not made in that court must be regarded as waived, and cannot be made for the first time on appeal to this court. (*Kelly v. City of Chicago*, 148 Ill. 90; *Chicago Terminal Transfer Co. v. City of Chicago*, 178 id. 429; *Fiske v. People*, 188 id. 206; 2 Cyc. 677.) That rule applies to all objections which the county

court has jurisdiction to hear and determine, but an objection that the court had no jurisdiction of the subject matter is one that cannot be waived, and may be raised for the first time on appeal or writ of error. A judgment rendered by a court having no jurisdiction of the subject matter is a mere nullity. Consent cannot give jurisdiction over subject matter, and a court may take notice of a want of jurisdiction of its own motion. (*Foley v. People*, Breese, 57; *Way v. Way*, 64 Ill. 406; 2 Cyc. 680.) In this case there is no question of jurisdiction of the persons of appellants. Where a party voluntarily appears and files objections recognizing the jurisdiction, he waives all questions as to jurisdiction over him. The objections now urged, not having been made in the county court, cannot be reviewed except so far as they relate to jurisdiction over the subject matter.

The objections argued here are all what are termed "legal objections" to the assessment, which were proper to be heard by the court. On the question of benefits,* appellants waived a jury and offered no evidence, so that there is no question of that kind. When the legal objections were overruled by the court no exception was taken to the ruling or decision, and it could not be reviewed for want of an exception. In order to preserve a question for review on appeal, an exception must be taken to the decision. (*East St. Louis Electric Railway Co. v. Stout*, 150 Ill. 9; *Trigger v. Drainage District*, 193 id. 230; 2 Cyc. 714; 8 Ency. of Pl. & Pr. 163.) All objections, therefore, which do not go to the jurisdiction of the county court over the subject matter have been waived and cannot be considered on this appeal, even if they were embraced in objections filed.

There can be no doubt that the county court had jurisdiction to hear and determine most of the objections presented to this court. The estimate contained thirty-three items, and the objection to it is, that portions of the improvement which should have been separately itemized were included in one item. The county court had jurisdiction to

hear and determine that question. The same is true of the questions whether there was a variance between the ordinance and the estimate, and whether the ordinance sufficiently gave the nature, character, locality and description of the improvement. It cannot be said that the ordinance contained no description of the improvement, but, on the contrary, it was very lengthy, with minute descriptions embracing a great many details. Whether it contained something which was not embraced in the estimate the county court was authorized to decide, subject to review on appeal. The questions whether the ordinance would require future legislation in order to make it operative and whether the superintendent of special assessments was legally qualified to make the assessment are not questions affecting the jurisdiction of the county court, but questions which were proper to be presented to that court and decided by it. If appellants claimed that the provision of the Local Improvement act authorizing the superintendent of special assessments to act was void they ought to have presented that question to the county court.

While we do not decide whether the jurisdiction of the county court over the subject matter would be affected if it should be held that the improvement provided for is not a local improvement, we think it clear that the pumping station and system of sewers constitute a local improvement for which a special assessment may properly be levied. An improvement of a local character may be of some general benefit to the city at large, and the Local Improvement act contemplates that some portion of the burden may be laid upon the public, but it is clear that a large portion of the city would derive little or no benefit or advantage from the improvement. The substantial benefits to be derived from it are local in their nature, and a portion of the city, where the sewers are laid, will be specially and peculiarly benefited in the enhancement of property. The system of sewers and a sewage pumping station, although a benefit to a considerable area of the city, covers but a small part of the city and is not

a general water-works plant or a plant for street lighting, which is of general utility to all the inhabitants of the municipality, as in the cases of *Hughes v. City of Mokenca*, 163 Ill. 535, *Hewes v. Glos*, 170 id. 436, and *Ewart v. Village of Western Springs*, 180 id. 318.

The objection that the judge before whom the question of benefits was tried did not have jurisdiction and that the judgment entered by him was void is one that can be raised on this appeal under the rules already stated. The *placita* at the commencement of the record shows that Orrin N. Carter is sole presiding judge of the county court. The record recites that the cause came on for hearing before him on the legal objections of appellants, and that he heard and overruled all such objections and set the objection as to benefits down for trial at a future time. In pursuance of that order the objection relating to benefits came on for trial before Linus C. Ruth, acting judge of the county court of Cook county. County judges may hold court for each other and perform each other's duties. The record does not show whether Judge Carter was at the time holding court in Cook county, but if he was it would be no objection. (*Pike v. City of Chicago*, 155 Ill. 656; *Wells v. People*, 156 id. 616.) We will take judicial notice that Linus C. Ruth was judge of the county court of DuPage county, (*Vahle v. Brackenseick*, 145 Ill. 231,) and he could legally hold the county court in Cook county. This is not the same question raised in *Stubbings v. City of Evanston*, 156 Ill. 338, where it appeared from the record that one person was sole presiding judge of the court and that another person presided during the trial.

The judgment of the county court is affirmed.

Judgment affirmed.

THE CHICAGO CITY RAILWAY COMPANY

v.

MARY SAXBY.

Opinion filed December 22, 1904.

1. DAMAGES—*effect where plaintiff's physicians use improper treatment.* If a person injured uses reasonable care to employ physicians of ordinary skill and experience to treat her injuries, the law regards the injury resulting from the mistake of the physicians or from the failure of the means employed to effect the cure as a part of the immediate and direct damages flowing from the injury.

2. SAME—*effect where organic tendency to disease is developed by injury.* The fact that an injured person has an organic tendency to tuberculosis, which disease is developed in her knee by the injury to it or by the treatment employed by ordinarily skillful and experienced physicians to cure the injury, does not necessarily show that the diseased condition of the knee is not a direct damage naturally flowing from the injury,

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ROBERT B. SHIRLEY, Judge, presiding.

This was an action on the case brought by the appellee in the circuit court of Cook county, against the appellant, to recover damages for an injury to her person claimed to have been sustained by her in consequence of the car of appellant, upon which she was a passenger, being suddenly started as she was about to leave the car and before she had time to alight upon the street, whereby she was thrown down and injured. The jury returned a verdict in her favor for \$16,000, and upon her remitting \$6000 of that amount the court overruled a motion for a new trial and entered judgment upon the verdict for \$10,000, which judgment has been affirmed, upon appeal, by the Appellate Court for the First District, and a further appeal has been prosecuted to this court.

Two reasons are urged in this court as grounds for reversal: First, that the verdict is not justified by the evi-

dence; second, the court admitted improper evidence on behalf of the appellee.

WILLIAM J. HYNES, and WATSON J. FERRY, (MASON B. STARRING, of counsel,) for appellant.

B. B. DAVIS, and WALKER & WILLIAMS, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

At the close of the plaintiff's evidence, and again at the close of all the evidence, the defendant requested the court to instruct the jury to return a verdict in its favor, which the court declined to do, and the action of the court in that regard has been assigned as error.

On the evening of August 16, 1899, appellee was a passenger upon one of appellant's cars going south upon Indiana avenue, in the city of Chicago. The evidence introduced on her behalf tended to show that as the car approached Forty-fifth street she signaled the conductor to stop the car at that street; that the car stopped at the intersection of Indiana avenue and Forty-fifth street; that she started to leave the car, but before she had time to alight upon the ground, and while she stood upon the running-board upon the west side of the car, the car was suddenly started without warning to her and she was violently thrown from the car upon the street, where she struck upon her left side and was injured. At the time of the accident the appellee was sixty years of age and was in good health. From the time of the injury to the date of the trial, which occurred more than two years after the accident, she had left her room but once, and at the time of the trial was unable to sit up but a portion of the time, or to walk; that the injury was to her left leg; that the neck of the femur bone of that leg was fractured, and tuberculosis had developed in the left knee, and the knee-joint of that leg had become ankylosed.

The main contention of the appellant is that the diseased condition of the knee was caused by the leg being improperly

treated by the physicians employed by the appellee by placing thereon splints and plaster casts and attaching to the foot pulleys and weights, and that tuberculosis, which, it is claimed, was organic with her, by reason of such imperfect treatment was developed in the knee, and it is urged that by reason of those facts the diseased condition of the knee was not the natural and ordinary consequence of the injury received by appellee at the time she fell upon the street, and that she ought not to be permitted to recover damages from the appellant for the conditions which were shown to exist in the knee. The appellee, immediately after the injury, was carried to her apartment and was treated by Drs. Freund and Farnum, and Drs. Fenger and Andrews were called in consultation,—Dr. Freund was called within a few minutes after the accident,—all of whom were physicians practicing their profession in the city of Chicago. She was also cared for by a trained nurse during the first eighteen months succeeding her injury, and at the time of the trial had in her employ a young woman who had devoted her entire time to her care since the trained nurse left her employ. Drs. Halstead and Findley, also physicians in practice in the city of Chicago, were called as experts and approved the treatment applied to the appellee by her attending physicians.

It was the duty of the appellee to use reasonable care to effect a speedy and complete cure of the injury which she sustained by being thrown upon the street from appellant's car, and to that end she was required to exercise reasonable care to employ physicians of ordinary skill and experience to treat her and other means to effect a cure of her injuries. She was not, however, required to employ the highest medical skill which might be found. All the law required was that she exercise such prudence as men and women of ordinary judgment, under like circumstances, would exercise in the choice of physicians and the means to be used to effect a recovery. She was not an insurer, bound to act at her peril, and if she exercised reasonable care in selecting her physi-

cians and in the employ of other means for her recovery, if her physicians made a mistake in the treatment applied by them to her or the means employed failed to effect a cure, then she may recover for the entire injury which she has sustained, as the law (if the injured person uses ordinary care in selecting a physician and in the employment of other means to effect a cure) regards an injury resulting from the mistake of a physician or from a failure of the means employed to effect a cure as a part of the immediate and direct damages which naturally flow from the injury.

In *Pullman Palace Car Co. v. Bluhm*, 109 Ill. 20, which was a personal injury case, the court permitted the plaintiff to prove that the bones of his arm which were broken had not healed but that the same had formed a false joint. On page 25 the court said: "If appellee exercised ordinary care to keep the parts together and used ordinary care in the selection of surgeons and doctors, and nurses, if needed, and employed those of ordinary skill and care in their profession, and still, by some unskillful or negligent act of such nurses or doctors or surgeons, the parts became separated and the false joint was the result, appellant, if responsible for the breaking of the arm, ought to answer for the injury in the false joint. The appellee, when injured, was bound by law to use ordinary care to render the injury no greater than necessary. It was therefore his duty to employ such surgeons and nurses as ordinary prudence in his situation required, and to use ordinary judgment and care in doing so, and to select only such as were of at least ordinary skill and care in their profession. But the law does not make him an insurer, in such case, that such surgeons or doctors or nurses will be guilty of no negligence, error in judgment or want of care. The liability to mistakes in curing is *incident* to a broken arm, and where such mistakes occur, (the injured party using ordinary care,) the injury resulting from such mistakes is properly regarded as part of the immediate and direct damages resulting from the breaking of the arm."

In *Collins v. City of Council Bluffs*, 32 Iowa, 324, the court instructed the jury, if in the selection of a physician and in the use of other means for effecting a cure the plaintiff used reasonable and ordinary care her damages should not be diminished, notwithstanding her suffering might have been alleviated and her condition improved. The court, in discussing this instruction, said (p. 329): "This instruction unquestionably announces a correct rule. All that the law required of plaintiff was the exercise of her judgment and the care which men of ordinary prudence, under like circumstances, would exercise in the choice of physicians and the means to be used to effect her recovery. She was not required to employ the best surgical skill and the means best adapted to heal her injuries. These may not have been within her reach; and while she may have possessed prudence, and reason even, in the highest degree possessed by men who are unlearned in medicine and surgery, she still may have been unable to choose the best means for her recovery. But she was required to exercise only the judgment and care which men and women in her condition are ordinarily capable of exercising. This is the purpose of the instruction."

The evidence fails to establish with any degree of certainty that the appellee had in her system an organic tendency to tuberculosis,—at least at the time of the injury it was not developed in any form and prior to the injury her left knee was in a healthy condition; and at least two of the physicians called by her stated, in reply to hypothetical questions submitted to them, that in their opinions the conditions found in her left knee were due to an external injury, and the appellee testified,—and she was corroborated by Dr. Freund,—that her left leg was swollen and painful from the time of the injury. If, however, it be conceded that she had tuberculosis in her system and that the same was developed in the knee by reason of the injury thereto or from the treatment she received in the endeavors made to effect a cure of

the fracture of the neck of the femur, we think it cannot be said that the diseased condition of the knee was not a consequence which naturally and ordinarily might follow as a result of the injury of appellee caused by the negligent act of appellant.

In *Stewart v. City of Ripon*, 38 Wis. 584, an action was brought to recover damages alleged to have been sustained by the plaintiff from a fall upon a defective sidewalk. The contention was made, on behalf of the city, that the diseased condition of the arm of the plaintiff was due to the fact that he had in his system an organic tendency to scrofula, and that such tendency was the proximate cause of the necrosis of the bone of his arm, and not the injury which he sustained by falling upon the sidewalk. The court held that although the diseased condition of plaintiff's arm might not have occurred but for his organic tendency to scrofula, still, if the disease was developed by the injury and a cure was retarded or prevented by reason of the presence of scrofula in the plaintiff's system, the defendant's negligence was the proximate cause of the whole injury. And in *Baltimore City Railway Co. v. Kemp*, 61 Md. 74, it was said: "It is the common observation of all that the effect of personal physical injuries depends much upon the peculiar conditions and tendencies of the person injured, and what may produce but slight and uninjurious consequences in one case may produce consequences of the most serious and distressing character in another; and this being so, a wrongdoer is not permitted to relieve himself from responsibility for the consequences of his act by showing that the injury would have been of less severity if it had been inflicted upon any one else of a large majority of the human family."

Mr. Thompson, in his *Commentaries on the Law of Negligence*, (vol. 1, sec. 150, p. 145,) says: "The duty of care and of abstaining from injuring another applies to the sick, the weak and the infirm, as well as to the strong and healthy. When this duty is violated the measure of damages is the

injury which results, though this injury may not have followed but for the peculiar physical condition of the person injured, although it may have been thereby aggravated." In section 151 of the same work (p. 147) it is said: "It may be stated, generally, that if the negligence of A produces a hurt to B which aggravates a pre-existing tendency to disease in B, the negligence, and not the disease, is deemed, in law, the proximate cause of the injury."

The author of the article on Contributory Negligence in the American and English Encyclopædia of Law (vol. 7,—2d ed.—p. 388,) says: "In cases where the defendant's negligence caused a disease, developed a latent tendency to disease, aggravated a prior disease or led in immediate sequence to disease, the defendant must respond in damages for such part of the diseased condition as his negligence caused; and if there can be no apportionment, or if it cannot be said that the disease would have existed apart from the injury inflicted by the defendant, then the defendant is responsible for the diseased condition."

The court instructed the jury upon behalf of the defendant: "The jury are instructed that even though the defendant were liable for the accident in question, still you are instructed that she could not recover in this case for any damage which was not the natural and necessary result of the accident and injury then sustained, if you find, from the evidence, she sustained injury at the time of the accident; and if you find, from the evidence, that the plaintiff has now, or has had, any other disability resulting from conditions which existed in the plaintiff prior to said accident and of which the accident in question was not the proximate cause, then you are not permitted, by law, to allow her anything for such disability, and should not do so from motives of sympathy or any other motive."

The question was therefore submitted to the jury whether the injuries from which the appellee was suffering were the results of the diseased condition of her system which existed

prior to her injury, or were the direct and immediate result of the appellee being thrown from the car upon the ground by the negligent act of the appellant, and they were told if her injuries were the result of disabilities with which she had been afflicted prior to the injury, she could not recover damages by reason of such disabilities. The question whether or not the injuries of the appellee were the result of the negligence of the appellant or resulted from disease or a tendency to disease was a question of fact, and as there was evidence in the record which fairly tended to show that the injuries from which the appellee was suffering were the result of her being thrown from the appellant's car, we are of the opinion the trial court did not err in declining to take the case from the jury, even though the injuries of the appellee were aggravated by the fact that she had in her system an organic tendency to tuberculosis, which was developed by the injury or the treatment applied to the injury by the physicians and which retarded or prevented a complete recovery.

Numerous exceptions were taken upon the trial to the rulings of the court upon questions pertaining to the evidence. We have examined the questions thus raised, and are of the opinion that the trial court in that regard in no instance committed reversible error. For example, the appellee, in detailing, upon her direct examination, the result of the injury occasioned to her person by the fall, said: "I was upset in every particular; every function of my body, I think, was out of order from the shock, and I suffered terribly in every way." This statement of the witness was unimportant. She had already testified fully as to the manner in which she fell from the car and the effect of the fall, and while the statement was in a certain sense the expression of an opinion, it was in a broader sense the statement of a fact,—that is, the condition her person was in as a result of the injury. In any event, in the opinion of the court the refusal to strike out the answer should not cause a reversal of the case.

While Dr. Davis, who had treated the appellee, was upon the stand, he was asked, "What is the fact, Doctor, as to tuberculosis being occasioned by trauma or violence?" to which he replied: "Tuberculosis may be caused to center at the point of trauma; a great many instances are known where it occurs." It is urged there was no evidence upon which to base the question, as the evidence failed to show the left knee of appellee was injured at the time of the accident. The evidence showed the appellee was thrown from the car and struck upon the ground upon her left side; that prior to her injury she was in good health, and that she sustained an injury to the hip which subsequently involved the knee. While upon the stand she testified: "I suffered excruciating pain all the time in my hip and in my back—in my hip principally, but my limb was swollen and painful." Dr. Freund also stated: "The first time I discovered any visible evidence of anything the matter with the knee was the same night of the injury." He also stated: "During the period described the knee was always very painful—from the time of the injury." While he qualified this statement upon cross-examination, we think it cannot be said that there is no evidence that the knee was injured at the time of the accident. The court did not err in permitting the question to be answered.

We do not deem it necessary to take up separately and consider all of the objections to the court's ruling upon the evidence which have been raised and discussed in the briefs. Suffice it to say that they are technical in the extreme, and in our judgment had no perceptible effect upon the verdict and were not prejudicial to the appellant.

Finding no reversible error in this record the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

In re APPEAL OF THE MAPLEWOOD COAL COMPANY.

Opinion filed December 22, 1904.

1. *TAXES*—only question on appeal from decision of board of review is liability of property to taxation. In a proceeding in the Supreme Court to review the decision of the board of review the only question for consideration is whether the property is liable to taxation, and not whether it was correctly valued.

2. *SAME*—presumption is in favor of legality of assessment. One seeking to overthrow the decision of the board of review must affirmatively show sufficient grounds for so doing, as the presumption is in favor of the regularity and legality of the assessment.

3. *SAME*—mining rights are real estate and are taxable as such. Mining rights are real estate and should be taxed as such to the owner thereof.

4. *SAME*—effect where mining rights are assessed to owner of soil. The fact that land is assessed for its full value, including mining rights, to the owner of the soil, does not release a purchaser of such mining rights from liability for taxes thereon assessed to him after the severance, since the over-valuation can be complained of only by the person affected.

AUDITOR'S certificate of appeal from decision of board of review of Fulton county.

CHIPERFIELD & CHIPERFIELD, for appellant.

H. J. HAMLIN, Attorney General, for board of review.

Mr. CHIEF JUSTICE RICKS delivered the opinion of the court:

This is an appeal from the action of the board of review of Fulton county in assessing certain property to appellant, and certified to us by the State Auditor.

Appellant is operating a coal mine in Fulton county upon lands leased from the Horace Clark & Sons Company, and owns the machinery, consisting of engines, boilers and hoisting apparatus, cars, mules and tools. It presented to the assessor a schedule of its property, but the assessor not being

satisfied therewith declined to make the assessment upon such schedule and referred the same to the board of review for its action. Appellant was cited before that board and upon a hearing was assessed, and three items are complained of. The items are: (1) twenty-five mules, at \$1000; (2) investments in real estate and improvements thereon, \$1200; and (3) coal rights in lands, \$17,300.

The complaint as to the first item is that the assessment is too great. With that question we have nothing to do. The statute conferring authority to appeal, and on this court to consider appeals, confines our inquiry to the sole question of whether the property is liable to taxation.

Concerning the second item, appellant's president and general manager testified that the tipple, boiler house and buildings at and around the shaft were, in his opinion, real estate and worth \$1200,—the amount of the item objected to. He says they were constructed and held there under an agreement with the Clark & Sons Company, that if appellant, as lessee, has performed certain conditions mentioned in the lease between the Clark & Sons Company and appellant, the latter may remove the same. The witness does not make himself very clear in regard to this item and the lease was not introduced in evidence. The board was not confined to the statement of appellant's witness, who alone testified, but could act upon information coming to it from other sources or upon its own knowledge. If appellant leased the right to mine and operate certain mining rights owned by the Clark & Sons Company, with the agreement that appellant should construct the buildings necessary thereto and upon complying with the conditions of the lease should have the right to remove the buildings, the latter were personal property and the property of appellant until it had been determined that appellant had forfeited its rights, when the buildings would become attached to and a part of the realty by reason of the forfeiture. Appellant does not make this matter so clear that it may not be reasonably and fairly inferred that the facts

were as we have above presumed they might be, and we are unable to say that the property was not liable to assessment as belonging to the appellant. The burden is upon appellant. It is complaining of the official acts of the board designated by the law to make the assessment. The presumptions are all in favor of the regularity and legality of the assessment, and one seeking to impeach it must affirmatively show sufficient grounds for doing so.

The third item consists of about eight hundred acres of coal rights owned by appellant in fee. These coal "mining rights" had been purchased from the owners of the surface, and are described as vein No. 5 under certain lands in Fulton county. A list of the lands under which the coal lies was agreed upon and is contained in the record, and it appears that appellant paid \$30 per acre for such coal rights. By the board of review the property was scheduled and assessed as personal property. Appellant contends that it is not subject to taxation and cannot be assessed to it at all, and if it is subject to taxation it must be assessed as real estate.

The argument that the property is not subject to taxation proceeds upon the ground that as our statute requires that lands be assessed quadrennially, and as the last assessment of land was made in 1903, at which time, it is argued, the lands under which these mining rights lie were assessed for their full value, including the mining rights, therefore, if the mining rights be assessed to appellant, there would be a double taxation of the same property. The evidence taken only shows that three hundred and fifty acres of these rights were purchased since 1903, but if it showed that they were all purchased since that time we do not think the contention of appellant should be admitted. By the purchase of the mining rights by appellant there was a separation of such rights from the land, as declared by section 7 of chapter 94, (Starr & Cur. Stat. 1896,) in such a manner, as declared by the statute, that "any sale of the land for any tax or assessment shall not include or affect such mining right." If effect is to

be given to this provision of the statute and the contention of appellant is to be admitted, then the land of the proprietor, owning all except the mining right, can be sold for the tax due from appellant and its interest in the land not thereby be affected. It would be manifestly unjust so to construe the language, and we do not think the argument warrants such construction. The evidence does not show that the assessment of the land included the mining right. The only evidence upon that subject was a copy of the assessment roll assessing the property to the original proprietor. If, however, as a matter of fact, the property is assessed to the original proprietor, including the land and the mining rights, which belong to appellant, it is the fault of the proprietor. He has his remedy, and if he does not elect to avail himself of it, but permits an excessive assessment to the extent that appellant's mining rights depreciated the value of the land, it is not for appellant to complain for him. He alone can make that complaint. The law requires that appellant shall be assessed upon its property, and it cannot urge that because some other property holder is assessed enough higher than he ought to be, to make up the tax that appellant ought to pay, therefore appellant ought not to pay any tax.

That appellant's mining rights, as here involved, are real estate and should be taxed as such seems so well settled by previous decisions of this court that that question hardly requires further discussion. *In re Major*, 134 Ill. 19; *Consolidated Coal Co. v. Baker*, 135 id. 545; *Sholl Bros. v. People*, 194 id. 24.

It was error to list and assess this property on the personal property schedule. It should have been assessed as the mining rights in the lands, describing them, in which case the mining rights can be sold for the taxes as other lands. In this regard the assessment is not approved. In all other respects it is approved.

Assessment sustained in part.

FRANK J. CROCKER

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Opinion filed December 22, 1904.

1. CRIMINAL LAW—*statements of counsel derogatory to the accused are proper if based on facts.* It is not improper for a prosecuting attorney to reflect unfavorably upon the accused or denounce his wickedness,—even to indulge in invective,—if his remarks are based upon evidence competent and pertinent to be decided by jury.

2. SAME—*when a statement by the prosecuting attorney will not reverse.* A statement by the prosecuting attorney in his argument to the jury on the trial of one accused of rape, that "if the evidence be true the defendant has been as low as the most lecherous animal that ever crawled on earth," is not ground for reversal, where the evidence is such as to show the statement was well merited.

WRIT OF ERROR to the Criminal Court of Cook county;
the Hon. JOSEPH E. GARY, Judge, presiding.

BURRES & MCKINLEY, for plaintiff in error.

H. J. HAMLIN, Attorney General, and CHARLES S. DE-
NEEN, State's Attorney, (FRANK CROWE, of counsel,) for
the People.

Mr. JUSTICE BOGGS delivered the opinion of the court:

An indictment returned into the criminal court of Cook county charged the plaintiff in error with the crime of rape, in having carnal knowledge of the person of Grace Platt, a child of the age of thirteen years. The indictment also charged Ada Platt, the mother of Grace, and Nora Mack, her aunt, as accessories at and before the fact to the commission of the crime. On the trial, on motion of the State's attorney, the jury returned a verdict of not guilty as to Ada Platt and Nora Mack, and upon a full hearing the jury found the plaintiff in error guilty as charged and fixed his punishment at imprisonment in the penitentiary for the term

of one year. The motion entered by the plaintiff in error for a new trial was overruled and the sentence of the court in accordance with the verdict of the jury was pronounced. This is a writ of error to reverse the judgment of conviction.

Ada Platt and her daughter, the prosecutrix, lived at 516 West Sixty-sixth place, in Chicago. Nora Mack, an unmarried sister of Mrs. Platt, also made her home in the same dwelling. The plaintiff in error, a widower of the age of thirty-three years, during seven or eight years before the commission of the alleged offense had been in the habit of going to the home of Mrs. Platt and having sexual intercourse with Nora Mack. On such occasions he occupied a bed with Nora Mack and remained with her during the night. The girl, Grace Platt, was sometimes placed in the same bed occupied by the plaintiff in error and Nora Mack. These facts were established not only by the evidence for the People, but by the testimony of the plaintiff in error as well. Grace Platt testified that during the month of March, 1904, the plaintiff in error came to the house of her mother and slept during the night in a bed with herself and her aunt, Nora Mack; that he had intercourse with her during the night. Plaintiff in error, though admitting that he at different times occupied the same bed with Nora Mack and Grace Platt and frequently had intercourse with Nora Mack, denied that he ever had carnal knowledge of the girl. A written statement signed by the plaintiff in error stated that he had occupied the same bed with Nora Mack and Grace Platt; that he slept between them and that he felt and touched the private parts of both, and that he had intercourse with Nora Mack. Plaintiff in error, as a witness in his own behalf, admitted that he had a number of times occupied the same bed with Nora Mack and Grace Platt, but denied that he had ever had intercourse with the girl at any time. He testified that the paper introduced in evidence purporting to be his written statement bore his genuine signature, but insisted that he did not read it before he signed

it. He testified that he did not remember telling the police that he had put his hands between the legs of Nora Mack and Grace Platt, but that he thought he did tell the police that he had inserted his finger in the private parts of Grace. The written statement was as follows: "Some time in February I went to Mrs. Mack's house and slept with Nora Mack and Grace Platt. I slept in the middle. I didn't have any connection with either one of them that night. I put my hand between Grace's legs and also between Nora's legs. About March 15 I went to Mrs. Mack's house again and slept with Grace Platt and Nora Mack. About March 16 I went to the house again and slept with Nora and Grace. I had intercourse with Nora. On the 17th inst. I went to the house again and slept with Nora. Grace slept on the lounge. On the 19th inst. I went to the house again and slept with Nora and Grace. I slept in the middle of the bed."

Counsel for plaintiff in error insist that the guilt or innocence of the accused was solely a question of veracity between the prosecutrix and the accused. Conceding that to be true, when the admissions of the plaintiff in error are considered the jury would be amply justified in believing the statements of the girl that he had had sexual intercourse with her to be by far the most reasonable and probable. It would, indeed, have been strange had the jury accepted his own denial of intercourse as being true, knowing, as they did, such other acts of his as he admitted to be true.

The ninth instruction given on behalf of the People related to the right of the plaintiff in error to testify; to the tests which the jury might legally apply and subject his testimony to in order to determine the degree of credibility and weight that should be accorded thereto. The giving of this instruction is assigned as for error. The instruction is identical with instruction No. 3 which came in review in this court in *Hirschman v. People*, 101 Ill. 568, and instruction No. 4 reviewed in *Rider v. People*, 110 id. 11. In each of those cases the instruction was held to be free from any sub-

stantial error or objection. There was no prejudicial error in giving it in the case at bar. *Swan v. People*, 98 Ill. 610, and *Dacey v. People*, 116 id. 555, are authority for the contention that the false testimony of a witness must have related to a matter material to an issue in the cause in order to justify the jury in disregarding his testimony, and so the jury were expressly advised in the concluding statement of the instruction here complained of.

In the course of his address to the jury, counsel for the People, among other things, said: "Why, if the evidence be true, the defendant has been as low as the most lecherous animal that ever crawled on earth. I am not going to call him names—I am not going to call any man names." Counsel for plaintiff in error objected to the remark "low, lecherous animal." The court did not sustain the objection, and counsel for plaintiff in error preserved an exception. It is urged the remark was so grossly abusive and unfair as to prevent an impartial consideration of the case by the jury.

It is the duty of trial courts to restrain counsel, in their arguments, within the limits of professional duty and propriety. A gross abuse of the privilege of counsel to argue the facts and law of the case to a jury, if it prejudices the cause of the opposite party, would constitute good ground for a new trial; but arguments and statements of counsel based on the facts appearing in the proof, or on legitimate inferences deducible therefrom, do not transcend the bounds of legitimate debate and are not to be discountenanced by the courts. It is not improper for a prosecuting attorney to reflect unfavorably on defendant or denounce his wickedness, and even indulge in invective, if based upon evidence competent and pertinent to be decided by the jury. (2 Ency. of Pl. & Pr. 747.) It is not improper for the prosecuting attorney to denounce a defendant to be a "murderer," in the trial of an indictment for murder, if there is testimony tending to support the truth of the charge. (*State v. Griffin*, 87 Mo. 608.) Whatever is deducible from the testimony by direct proof or

legitimate inference from facts that are proven, and which bears upon the issue in a cause, must be a fair subject of comment by counsel, and if such deductions or inferences tend to fix upon a defendant the wickedness and crime that are charged against him, it must be within the scope of proper and fair argument to denounce him accordingly. The remarks of counsel for the State in the case at bar were well merited and in nowise objectionable.

The judgment is affirmed.

Judgment affirmed.

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WALTER B. WESTON *et al.*

v.

CHARLES TEUFEL *et al.*

Opinion filed December 22, 1904.

1. *WILLS*—admitting endorsement of judge showing probate of will is error. In a will contest, admitting in evidence, over contestants' objection, an endorsement on the will by the probate judge showing the will to be proved and admitted to probate in open court is reversible error, where the evidence is close and conflicting.

2. *SAME*—allegations of bill that will was probated does not cure error in admitting order of probate. An allegation in a bill to contest a will that the will had been admitted to probate is a necessary one in all cases, and does not cure the error of admitting in evidence the endorsement of the probate judge on the will showing probate.

3. *SAME*—error in admitting endorsement of probate judge not cured by instruction to disregard it. Error in admitting in evidence, in a will contest, an endorsement signed by the probate judge on the back of the will stating that the will had been proved and admitted to probate, is not cured by an instruction to the jury to disregard it.

4. *SAME*—burden of proof of undue influence where fiduciary relation exists. Proof of a fiduciary relation between the testator and a principal devisee, who was the dominant party to the relation, casts upon the devisee the burden of overcoming the presumption of undue influence, but does not change the rule that upon the whole case the burden is upon the contestants to establish the undue influence by a preponderance of the evidence.

5. INSTRUCTIONS—*when instructions for proponent in will contest are erroneous.* Instructions for the proponent in a will contest are erroneous where each one isolates a separate fact and tells the jury such fact is not sufficient to overthrow the will, where it appears that if all the facts were considered together a different result might be reached.

6. SAME—*when instruction as to disregarding false testimony is erroneous.* An instruction authorizing the jury to disregard the entire testimony of a witness who they believed had knowingly testified falsely to a material fact, except in so far as that testimony was corroborated by other "competent testimony," etc., is erroneous in using the word "competent" instead of "credible."

WRIT OF ERROR to the Superior Court of Cook county;
the Hon. AXEL CHYTRAUS, Judge, presiding.

C. J. MICHELET, and S. B. KING, for plaintiffs in error:

Where the execution of a will is obtained by a beneficiary largely interested in its provisions, in the absence of excluded heirs who had at least equal claims upon the justice of the testator, and the will departs from the provisions of a previous will in favor of the excluded heirs, and the testator is of advanced years or impaired health, such undue influence is established as will vitiate the will. *Smith v. Henline*, 174 Ill. 184; *Purdy v. Hall*, 134 id. 298.

The fact of confidential relation between a testator and a favored beneficiary casts upon the proponents the burden of proving that the will was not procured by undue influence. *Coghill v. Kennedy*, 119 Ala. 641; *Richmond's Appeal*, 59 Conn. 226; 1 Woerner on Administration, (2d ed.) sec. 32.

Confidential relation sufficient to shift the burden of proof to proponent on the issue of undue influence will arise from the fact that a will is written or procured to be written by a person largely benefited by it. *Purdy v. Hall*, 134 Ill. 289; *Bush v. Delano*, 113 Mich. 321.

The existence of confidential relation between a legatee under a will and the testator, will, when coupled with activity on his part in procuring its execution, raise an inference of undue influence upon his part. *Boyd v. Boyd*, 66 Pa. St.

283; *Coghill v. Kennedy*, 119 Ala. 641; *Henry v. Hall*, 91 id. 84; *Scattergood v. Kirk*, 192 Pa. St. 263; *Richmond's Appeal*, 59 Conn. 226.

And this, even though the testatrix acted voluntarily and of her own free will. *Boyd v. Boyd*, 66 Pa. St. 283; *Marx v. McGlynn*, 88 N. Y. 357; *Banta v. Willets*, 6 Demorest, 84.

Actual imposition and constraint and the undue influence presumed from confidential relation are two distinct species of undue influence. *Thomas v. Whitney*, 186 Ill. 225; *Marx v. McGlynn*, 88 N. Y. 357; *Banta v. Willets*, 6 Demorest, 84.

The mere presence of a confidential relation between the donor and donee creates a presumption of undue influence. *Thomas v. Whitney*, 186 Ill. 225; *Harvey v. Sullens*, 46 Mo. 147; *Garvin v. Williams*, 44 id. 465.

No distinction can be taken, in the application of this rule, between deeds and wills. It is applicable alike to both. *Garvin v. Williams*, 44 Mo. 465.

The admission of the order admitting the will to probate is error which will reverse in a close case. *Craig v. Southard*, 148 Ill. 37; *Purdy v. Hall*, 134 id. 298.

It is reversible error to submit to the jury the question of what evidence is competent. *Schimmelfenig v. Donovan*, 13 Ill. App. 47.

WALKER & PAYNE, HARVEY B. HURD, and GEORGE P. MERRICK, for defendants in error:

The testatrix was of sound mind and disposing memory, since she knew and understood fully all the property she possessed, where the same was situated, the names and situations of all the persons whom she desired to make objects of her bounty, carried on her business, made contracts, collected her rents, and was in the full possession of her faculties when she made her will, and qualified, under all the authorities, to dispose of her property. *Rutherford v. Morris*, 77 Ill. 397; *Freeman v. Easley*, 117 id. 317; *Craig v. Southard*, 148 id. 37; *Yoe v. McCord*, 74 id. 33; *Burt v. Quisenberry*, 132 id.

393; *Greene v. Greene*, 145 id. 267; *Pooler v. Cristman*, 145 id. 405; *Francis v. Wilkinson*, 147 id. 371; *Taylor v. Pegram*, 151 id. 106; *Mahon v. Mooney*, 196 id. 147.

There is no evidence in this record which shows that Chas. Teufel, directly or indirectly, influenced Nancy Bailey in the making of her will. She acted freely, unrestrained and independently, and advised with Charles S. Hart, a member of her family, her step-nephew and a lawyer by profession. There is no proof of undue influence such as is contemplated by law. *Biggerstaff v. Biggerstaff*, 180 Ill. 407; *Greene v. Greene*, 145 id. 267; *Dickie v. Carter*, 42 id. 376; *Yoe v. McCord*, 74 id. 33; *Allmon v. Pigg*, 82 id. 149; *Pooler v. Cristman*, 145 id. 405; *Burt v. Quisenberry*, 132 id. 393; *Francis v. Wilkinson*, 147 id. 371; *Rutherford v. Morris*, 77 id. 397.

The verdict of the jury finding in favor of the will, and finding that the testatrix was of sound mind and memory and not under the undue influence of Charles Teufel, cannot be disturbed unless palpably against the preponderance of the evidence. *Greene v. Greene*, 145 Ill. 267; *Moyer v. Swygart*, 125 id. 262; *Hoobler v. Hoobler*, 128 id. 645; *Meeker v. Meeker*, 75 id. 260; *Long v. Long*, 107 id. 210; *American Bible Society v. Price*, 115 id. 625; *Johnson v. Johnson*, 187 id. 86; *Hollenbeck v. Cook*, 180 id. 65; *Egbers v. Egbers*, 177 id. 82; *Smith v. Henline*, 174 id. 184.

In a case where the statute requires an issue in chancery to be made up to be tried by jury, the verdict is not advisory, but is as conclusive as a verdict of a jury in an action at law. *Meeker v. Meeker*, 75 Ill. 260; *Whipple v. Eddy*, 161 id. 114; *Lenning v. Lenning*, 176 id. 180.

Where a case is heard by the chancellor, and the evidence is all, or partly, oral, it must appear that there is clear and palpable error before a reversal may be had. *Coari v. Olsen*, 91 Ill. 273; *Baker v. Rockabrand*, 118 id. 365; *Johnson v. Johnson*, 125 id. 510; *Ellis v. Ward*, 137 id. 509; *Allen v. Hickey*, 158 id. 362.

Mr. JUSTICE SCOTT delivered the opinion of the court:

Plaintiffs in error filed their bill in the superior court of Cook county to set aside the will and codicil of Nancy Bailey, deceased, which had been admitted to probate in the proper court of that county on the 9th day of December, 1896, upon the grounds that she was of unsound mind at the time of execution thereof, and that the execution of said will and codicil was procured by the exercise of undue influence on the part of Charles Teufel. After verdict, there was a decree for proponents, which is brought here for review.

Nancy Bailey died on August 19, 1896, at the age of sixty-four years, possessed of property worth approximately \$150,000. Her heirs-at-law were John McAllister and James McAllister, brothers, Jane Hart, a sister, and Walter and Charles Weston, children of a deceased sister. The will and codicil were executed on the same day and at the same time, the purpose of the codicil being to add a provision, and both will be hereinafter referred to as "the will."

Testatrix, after providing for the payment of debts and funeral expenses, in addition to making several small bequests, gave to Charles, Walter and Milton Weston \$500 each; devised to James McAllister and Jane Hart, "Bailey's Opera House, Evanston, in fee simple;" to Charles Hart, a son of Jane Hart, "the premises 815 Davis street, Evanston;" to Charles Teufel, "my residence, known as 'The Oaks,' No. 2907 Sheridan road, Evanston." The residue was given to James McAllister, Jane Hart and Charles Hart. Charles Teufel was nominated executor. By one clause of the will she excluded John McAllister from sharing in her estate. The proof tends to show that the real estate devised to Teufel was in value about one-third of her property. He is the principal devisee.

For many years the testatrix had been an inebriate, habitually addicted to the use of intoxicating liquor in excessive quantities. Charles Teufel, at the time of the execution

of the will, was a bachelor forty-four years of age. The bill avers and the evidence tends to prove that for several years prior to the execution of the will, he had been her man of business and had sustained very close confidential relations with her; that she was in a debilitated physical and mental condition, consequent upon intoxication habitual and long continued; that she reposed great confidence in him; that he had acquired such dominion and control over her that her will readily yielded to his persuasions, and that by reason thereof a fiduciary relation existed between them, by the abuse of which he secured the execution of the will in question.

The will was drawn on July 22, 1896. On that day, Charles Teufel went with her to the office of Charles S. Cutting, an attorney in the city of Chicago, with whom she had no previous acquaintance, for the purpose of having her will drawn. She informed the lawyer of the purpose of her visit, and he began to make memoranda in regard to the disposition of her property when he was called away. He suggested that Charles Teufel, who was still present, should complete the memoranda in his absence. When he returned Teufel had acted on the suggestion. The attorney then read the items aloud, and the testatrix assented to them. Teufel withdrew and Mrs. Bailey remained a half or three-quarters of an hour, discussing her business affairs and stating the reasons that impelled her in making the disposition of her property that she was making, and then took her departure. On the next day, in accordance with an arrangement made with her, Mr. Cutting took the will to Evanston, the place of her residence, where it was executed in the office of her physician, Charles Teufel being present at the time of the execution; and it appears that he had accompanied her to that office on that occasion. Later, on the same day, she departed from Evanston on a journey to Ireland, where she arrived on August 5, and where her death occurred on August 19 of the same year.

It is first urged that the verdict is against the manifest weight of the evidence. A previous trial had taken place in which a verdict had been returned for the contestants. That verdict was set aside by the *nisi prius* court because, as it is said, the jury was not properly instructed. A large amount of testimony was taken in the second trial. It covers 272 pages of the printed abstract. It is sharply conflicting and irreconcilable, and we do not think the decree should be disturbed on the ground above suggested. A large number of witnesses testified on behalf of proponents and a somewhat lesser number for the contestants. We have carefully considered this testimony, and as the case must be tried again, we refrain from any discussion of the evidence except to say that we consider the case a close one on the proof, more especially so upon one of the two questions presented by the pleadings.

In making their case in chief, the proponents introduced the certificate of the oath of the witnesses taken at the time of the first probate, and were also permitted to introduce, over the objection of the contestants, an endorsement on the will made by the judge of the probate court, which was in the words and figures following: "Will proved and admitted to probate in open court, this 9th day of September, 1896.—Christian C. Kohlsaas, Probate Judge." The admission of this endorsement is assigned as error.

We have heretofore held that a certified copy of the order of the court admitting a will to probate was not properly admitted in evidence on the trial of a will contest, and in a case where the evidence is conflicting, that its admission is prejudicial to the contestants. *Craig v. Southard*, 148 Ill. 37.

It is first sought to obviate this error by showing that the bill averred that the will had been admitted to probate in the probate court of Cook county. If this averment cures the error, it is manifest that the error is one that could not be availed of in any case, because without an averment in the

bill that the will had been admitted, no reason would appear for invoking the power of a court of equity to set it aside.

Under the statute, the sole question to be determined by the jury is, "whether the writing produced be the will of the testator or testatrix or not." (Hurd's Stat. 1903, chap. 148, sec. 7.) It is clear the endorsement in question could throw no light on that issue.

In *Graybeal v. Gardner*, 146 Ill. 337, the will had been admitted to probate in the circuit court upon an appeal from the probate court, and a bill in chancery thereafter filed to contest the validity of the instrument. In the trial of the issue made on the bill, the court permitted the proponents to read to the jury the order of the circuit court admitting the will to probate, and this was held to be error, but not of a reversible character, for the reason that it merely recited the testimony of the subscribing witnesses and expressly stated that the will was admitted to probate on the evidence of those witnesses alone, and that as a certificate of the evidence of those witnesses would have been *prima facie* proof of the validity of the will, the order simply amounted to proving the legal effect of the evidence of those witnesses, and was therefore harmless. The same thing cannot be said of this memorandum, as it does not show upon what evidence it was based. The conclusion that the jury would probably reach would be that the probate judge had made an investigation and ascertained that the will was valid. Whether that determination had been reached by that officer upon the testimony of the subscribing witnesses or upon that of many other persons, the jury would not know.

It is also suggested that the jury were instructed that the order of the probate court admitting the will to probate should not be considered in arriving at their verdict. We do not think this cures the error. In the first place, the objectionable evidence was not the order admitting the will to probate, but a memorandum endorsed on the will by the probate judge. In the second place, the evidence was harm-

ful for the reason that it gave to the cause of the proponents the support of the finding of the probate court. When the jury had once been acquainted with the fact that such a finding had been made by Judge Kohlsaat, the wrong had been done, and the instruction, if they had understood it to apply to this memorandum, could not have removed from their minds the impression that a verdict for contestants would be adverse to the views of the probate judge.

The admission of the memorandum in this case was reversible error.

The court instructed the jury that it was incumbent upon the contestants to establish one or the other of the grounds upon which the bill was based by a preponderance of the evidence, and this is said to be error so far as the question of undue influence is concerned.

Where a fiduciary relation exists between the testator and a devisee who receives a substantial benefit from the will and where the testator is the dependent and the devisee the dominant party and the testator therefore reposes trust and confidence in the devisee as in the ordinary relation of attorney and client, and where the will is written, or its preparation procured, by that beneficiary, proof of these facts establishes *prima facie* the charge that the execution of the will was the result of undue influence exercised by that beneficiary, and this proof standing alone and undisputed by other proof entitles contestants to a verdict. (1 Woerner on American Law of Administration,—2d ed.—sec. 32; *Richmond's Appeal*, 59 Conn. 226; *Marx v. McGlynn*, 88 N. Y. 357; *Garvin v. Williams*, 44 Mo. 465; *Coghill v. Kennedy*, 119 Ala. 641; *Thomas v. Whitney*, 186 Ill. 225.) This results from the distinction, pointed out in the authorities cited, between undue influence arising from coercion or active fraud and undue influence resulting from the abuse of a fiduciary relation existing between the parties. Proof of the relationship and of the fact that the beneficiary, in whom trust and confidence were reposed by the testator, prepared or pro-

cured the preparation of the will by which he profits, may or may not be a preponderance of all the evidence on that subject. When that proof is made, the presumption arises therefrom that undue influence induced the execution of the document. That proof casts upon proponent, if he is to sustain the will, the necessity of showing that the execution of the will was the result of free deliberation on the part of the testator and of the deliberate exercise of his judgment, and not of imposition or wrong practiced by the trusted beneficiary. This, however, does not change the general rule which is, that upon the whole case the burden of proof is upon the contestants to establish the undue influence.

No instruction presenting the doctrine pertaining to fiduciary relations, above recited, was offered by plaintiffs in error, nor was any instruction given inconsistent therewith.

There are five of the proponents' instructions, however, which are erroneous. The thirteenth, fourteenth, fifteenth and sixteenth instructions each, in substance, tells the jury that if Nancy Bailey executed the instrument in question of her own free will at a time when she possessed the requisite mental capacity, then that instrument is her will; the thirteenth and fourteenth, in differing language, direct the jury that this is true even though prior to the execution of this instrument she had made another and different will and had made statements that she might change this will upon her return from Ireland; the fifteenth instructs them that the will would not be invalidated by the fact that Nancy Bailey acted upon the suggestions and advice or persuasion of Charles Teufel; the sixteenth advises that the fact that the beneficiaries are those by whom the testatrix was surrounded and with whom she stood in confidential relations, or that Charles Teufel had for years been in control of her estate, are not grounds for inferring undue influence. Instructions of this character are misleading and calculated to confuse the jury. (*West Chicago Street Railroad Co. v. Petters*, 196 Ill. 298; *Drainage Comrs. v. Illinois Central Railroad Co.* 158 id.

353.) The objection is that each isolates a fact and tells the jury that such fact is not sufficient to overthrow the will. If this course was pursued with reference to each fact which contestants established, the proponents could have the jury instructed, by a separate instruction, that each one of many circumstances relied upon by contestants was not sufficient to warrant the jury in returning a verdict finding that the paper offered was not the will of the testatrix. This course would probably induce the jury to find for the proponents, when a consideration of all the circumstances together free from the influence of such instructions might lead the jury to the conclusion that the evidence preponderated in favor of the contestants.

The fifteenth instruction is also erroneous in another respect. It contains this language: "To vitiate a will on account of undue influence it must appear, from the evidence, that there was something wrongfully done, amounting to a specimen of fraud, compulsion *or other conduct improper under the instructions herein.*" An examination of the entire series of instructions discloses no language to which the words italicized above could apply. In fact many circumstances were proven and relied upon by contestants to establish undue influence which are not specifically referred to in the instructions in any manner, and the jury might well conclude that such circumstances were by this instruction excluded from their consideration.

The instruction given by the court at the instance of proponents in reference to the credibility of witnesses is inaccurate. By it the jury were instructed that if they believed from the evidence that any witness had knowingly testified falsely as to any material fact, then they were entitled to disregard entirely the testimony of that witness except in so far as that testimony was corroborated by other competent testimony or by facts and circumstances in evidence in the case. The jury are not the judges of whether evidence is or is not competent. The instruction erroneously uses the word

"competent" instead of the word "credible," or other word of like import. Evidence introduced may be competent and not credible, and the jury would under this instruction be required to give weight to the testimony of an impeached witness in so far as that witness was corroborated by competent evidence, even though they did not regard the corroborating evidence as credible.

A number of other errors are assigned, a careful consideration of which has led to the conclusion that they are each without merit. To discuss them would unnecessarily extend this opinion.

The decree will be reversed and the cause will be remanded to the superior court of Cook county for further proceedings consistent with the views expressed in this opinion.

Reversed and remanded.

ALBERT S. KINSLOE *et al.*

v.

JAMES B. POGUE *et al.*

Opinion filed December 22, 1904.

1. CERTIORARI—*when circuit court may award certiorari.* The circuit court may award the common law writ of *certiorari* to inferior tribunals and jurisdictions in the State if they have exceeded the limits of their jurisdiction or proceeded illegally and no mode is provided for reviewing their proceedings.

2. ELECTIONS—*provision that the decision in county seat election is final is a denial of appeal.* The provision of the statute that the decision of the county court in calling an election to change the county seat is final is equivalent to a failure to provide for a review of such decision by appeal or otherwise.

3. SAME—*right of signers of petition for county seat election to withdraw names.* Signers of a petition to call an election to change the county seat have the right to withdraw their signatures at any time before the county court has finally acted on the petition.

WRIT OF ERROR to the Appellate Court for the Second District;—heard in that court on writ of error to the Circuit Court of DeKalb county; the Hon. GEORGE W. BROWN, Judge, presiding.

This is a petition for a writ of *certiorari*, filed in the circuit court of DeKalb county by certain citizens and legal voters of said county, to require the county court of said county to send up its record wherein said county court had ordered an election to be held in said county for the purpose of voting upon the proposition to remove the county seat of that county from Sycamore to DeKalb. The petition was in the usual form, and alleged said county court was without jurisdiction to make the said order, and that there was no method provided by law whereby the order of said county court could be reviewed, by appeal or otherwise, as the statute provided the judgment of the county court, in ordering an election for the removal of a county seat, should be final. The writ was ordered to issue, and having been served upon the county judge and the clerk of the county court of said county, the clerk of the county court filed as a return to said writ the record of the county court in the matter of calling said election. A hearing was had upon the petition and return and a judgment was entered quashing the proceedings in the county court calling said election; which judgment has been affirmed by the Appellate Court for the Second District, and the record has been brought to this court for further review upon writ of error.

A. G. KENNEDY, County Attorney, and H. W. PRENTICE, (L. C. WHITMAN, and H. W. McEWEN, of counsel,) for plaintiffs in error.

HOPKINS, DOLPH, PEFFERS & HOPKINS, (H. A. JONES, and D. J. CARNES, of counsel,) for defendants in error.

Mr. JUSTICE HAND delivered the opinion of the court:

It is first contended the circuit court was without jurisdiction to issue the writ. The law is too well settled in this jurisdiction to now be questioned, that the circuit courts of this State may award the common law writ of *certiorari* to all inferior tribunals and jurisdictions within the State where it appears that they have exceeded the limits of their jurisdiction or where they have proceeded illegally and no appeal is allowed or other mode provided by law for reviewing their proceedings. (*People v. Wilkinson*, 13 Ill. 660; *Whitmer v. Commissioners of Highways*, 96 id. 289; *Commissioners of Mason and Tazewell Special Drainage District v. Griffin*, 134 id. 330; *Commissioners of Highways v. Quinn*, 136 id. 604; *Glennon v. Britton*, 155 id. 232; *Commissioners of Highways v. Barnes*, 195 id. 43.) In *People v. Wilkinson*, *supra*, the writ was issued by the circuit court to the county court, and in *Commissioners of Mason and Tazewell Special Drainage District v. Griffin*, *supra*, it was held that the writ lies, when issued by the circuit court, to all inferior tribunals and officers exercising judicial and *quasi* judicial functions. As has heretofore been said by this court: "It is unnecessary to multiply cases upon the authority of the court to issue this writ. It is a common law power and is vested in our circuit courts, which in this State are the highest courts of original jurisdiction." (*People v. Wilkinson*, *supra*; *Glennon v. Britton*, *supra*.) And in the *Griffin* case it was said (p. 340): "The general rule seems to be that this writ lies only to inferior tribunals and officers exercising judicial functions, and the act to be reviewed must be judicial in its nature and not ministerial or legislative. (*Lock v. Loxington*, 122 Mass. 290; *State v. Mansfield*, 34 Minn. 250; *In re Wilson*, 32 id. 145; *Robinson v. Supervisors*, 16 Cal. 208; *Ex parte Fay*, 15 Pick. 243; *Stone v. Mayor*, 25 Wend. 157; *Esmeralda v. District Court*, 18 Nev. 438; *Thompson v. Multnomah County*, 2 Ore. 34.) But it is not essential that the proceedings should be strictly and technically 'judicial,' in

the sense in which that word is used when applied to courts of justice. It is sufficient if they are what is sometimes termed 'quasi judicial.' The body or officers acting need not constitute a court of justice in the ordinary sense. If they are invested by the legislature with the power to decide on the property rights of others they act judicially in making their decision, whatever may be their public character.—*Robinson v. Supervisors, supra.*"

The statute authorizing the county court to call a county seat removal election provides that the decision of the county court in calling said election shall be final, which is an equivalent to failing to provide for the review of the action of the court in that regard, by appeal or otherwise. We think it clear, therefore, the circuit court did not err in issuing the writ.

The next question to be considered is, was the writ properly issued in this case? The statute providing for the removal of county seats (Hurd's Stat. 1903, chap. 34, p. 553.) provides the petition for removal must be signed by a number of legal voters of the county equal to two-fifths of the votes cast in said county at the last preceding presidential election. The court found that at the presidential election preceding the filing of the petition 8169 votes were cast in DeKalb county, and that two-fifths thereof was 3268. The petition, when filed, contained 3987 signatures, which were reduced to 3910 by striking therefrom certain names which were contested. On the convening of the county court at its September term, 1903, that being the term at which the petition properly came up for hearing, 1252 persons who had signed the petition for removal presented their petitions in the county court asking that they be permitted to withdraw their names from the removal petition. This the court declined to permit them to do. Had those names been permitted to be withdrawn from the removal petition, that petition, which was jurisdictional, would not have contained, by at least 500, the requisite number of signatures to give the

county court jurisdiction to order the election, and the petition, for want of a sufficient number of signatures, must have failed, and the court should have dismissed the same. The question whether the writ was properly issued in this case is therefore narrowed to the question whether those persons who sought to withdraw their names from the removal petition should have been permitted to withdraw them by the county court.

The petitions of withdrawal were presented to the court before the court had finally acted upon the petition and determined to call an election, and we are of the opinion they were presented in time, and that the persons signing them should have been permitted by the court to withdraw their names from the petition for removal. The right of a petitioner to withdraw his name from a petition before the tribunal authorized to act upon the petition has taken final action has recently been considered by this court in two cases,—*Littell v. Board of Supervisors of Vermilion County*, 198 Ill. 205, and *Theurer v. People*, 211 id. 296,—wherein the authorities were reviewed and the conclusion was reached that a petitioner has the right to withdraw his name from the petition at any time before the tribunal created by law to determine the matter submitted by the petition has finally acted. We see no difference in principle between the case at bar and those cases, and think the doctrine there announced should control in this case.

As the names of the petitioners who signed the petitions of withdrawal should have been eliminated from the petition for removal, it is apparent the county court, after said petitions of withdrawal were filed, exceeded its jurisdiction in ordering said election, and that the circuit court did not err in quashing the proceedings and the order of the county court in calling said election.

The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

THE ILLINOIS CENTRAL RAILROAD COMPANY

v.

JAMES F. SWIFT.

Opinion filed December 22, 1904.

1. **APPEALS AND ERRORS**—*requesting peremptory instruction presents a question of law.* Requesting a peremptory instruction to direct a verdict presents a pure question of law, and by the taking of an exception to its refusal the question of law is preserved for the consideration of a court of review.

2. **SAME**—*what not a waiver of error in refusing peremptory instruction.* Arguing the case and submitting the issues to the jury on instructions after the refusal of a peremptory instruction to direct a verdict, to which an exception was taken, is not a waiver of the question of law preserved by the exception. (*Consolidated Coal Co. v. Haenni*, 146 Ill. 614, and *Chicago Terminal Railroad Co. v. Schmelling*, 197 id. 619, criticised.)

3. **MASTER AND SERVANT**—*when servant cannot recover.* An experienced servant left to his own discretion as to the manner of performing task under a general order, who selects a dangerous method of doing the work instead of a safe method which is equally open to him, cannot recover from the master for consequent injury.

4. **SAME**—*master may assume that servant is possessed of ordinary mental faculties.* The master has the right to assume that an experienced servant of mature years is possessed of ordinary mental faculties, the usual powers of observation and such knowledge as is acquired by common experience.

5. **SAME**—*limit of doctrine of res ipsa loquitur.* The doctrine of *res ipsa loquitur* only applies where the thing from which the injury results is shown to be under the control of the defendant, and where the accident is such as in the ordinary course of things would not have happened had those in control used proper care.

6. **SAME**—*when doctrine of res ipsa loquitur does not apply.* If the tipping over of a pile-driver on which a servant was working was not the result of the condition in which the master left it, but occurred when the servant attempted to climb to the top after removing half of the supporting ropes without attaching a temporary support, the doctrine of *res ipsa loquitur* does not apply.

7. **PLEADING**—*when it is not error to sustain demurrer to plea.* If a plea of the Statute of Limitations interposed to all of the additional counts of the declaration does not present a defense to all of them it is not error to sustain a demurrer to the plea.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ABNER SMITH, Judge, presiding.

This was an action on the case, brought in the circuit court of Cook county, on September 25, 1897, by James F. Swift, the appellee, against the Illinois Central Railroad Company, appellant, to recover damages for a personal injury received by appellee on November 10, 1896, on account of the falling of a pile-driver through the alleged negligence of appellant. On January 7, 1898, a declaration consisting of one count was filed, in which it was alleged that on November 10, 1896, the plaintiff was in the employ of the defendant engaged in repairing a bridge across the Illinois river at LaSalle, Illinois; that near the bridge was a pile-driver, upon and fastened to a boat or float; that on the day aforesaid plaintiff's foreman ordered plaintiff to go down to the pile-driver, climb to the top thereof and bring to said foreman a piece of tackle and pulley which was fastened to the top of the pile-driver; that the defendant carelessly and negligently caused the pile-driver and float to be so arranged and constructed that when the plaintiff, with due care, ascended to the top of the pile-driver to remove the tackle, the fastenings which bound the pile-driver to the float gave way and the pile-driver fell and precipitated the plaintiff into the river, whereby he was injured. Appellant filed the general issue to this declaration. Afterwards, on June 27, 1901, the plaintiff filed seven additional counts to his declaration. The first of these counts charged the negligence of the defendant to have consisted in not having the pile-driver secured or fastened to the boat or float; the second and third, negligence in permitting the pile-driver to be insufficiently and improperly secured and fastened to the float; the fourth, negligence in failing to prevent plaintiff from going upon or ascending the pile-driver; the fifth and sixth, the same negligence as the original declaration; and the seventh, negli-

gence in permitting the pile-driver to become and remain unsafe and insecure. On June 28, 1901, the defendant filed the general issue to the additional counts, and on September 27, 1902, filed a plea of the Statute of Limitations to all the additional counts. A demurrer was interposed to the last mentioned plea and was sustained. A trial was had before a jury, and a verdict was returned for \$20,000 damages, upon which judgment was rendered, and an appeal was taken to the Appellate Court for the First District. The Appellate Court affirmed the judgment of the circuit court, and the railroad company appealed to this court.

The facts, as shown by the evidence, are substantially as follows: On November 10, 1896, while working for the defendant on a bridge crossing the Illinois river near LaSalle, plaintiff, who was employed as a bridge carpenter, was directed by the superintendent in control of the workmen to go with a fellow-workman, named Morphey, to a scow or flatboat, near the north bank of the river and about one hundred and fifty feet east of the bridge. The superintendent's order, according to Swift's testimony, was in these words: "I want you to go down to the river and get a pair of sheave-blocks that hang on the top of the pile-driver that sits on the barge." The scow, or barge, was standing in the water and extended lengthwise in an easterly and westerly direction. The pile-driver stood on the east end of the scow. Formerly an engine, used to operate the pile-driver, had occupied the west end, but it had been removed some time prior to the date of the injury. The west end of the scow rested on the bank of the river, while the east end was in deeper water, and the scow and pile-driver were inclined to the east.

The pile-driver consisted of two large upright timbers, thirty-six feet in length, resting in the east ends of two timbers known as bed-sills, and at right angles with said bed-sills. Two other timbers extended from the top of the upright timbers diagonally down to the other ends of the bed-sills, the bed-sills being twelve feet long, constituting a

support for the upright timbers. A ladder leading from the scow to the top of the pile-driver was constructed on the diagonal timbers. The eastern extremity of the bed-sills extended to the eastern edge of the scow, and the upright timbers extended directly up from this eastern edge. The pile-driver weighed about five thousand pounds, was thirty-six feet high and not more than twelve feet across at the base from east to west. The timbers of the base were fastened to the scow by drift-bolts and strips of iron to keep the base from shifting its position. Two sets of ropes and sheave-blocks, referred to by the witnesses as "falls," had been installed to prevent the pile-driver from tipping and falling over. As the pile-driver stood on the scow prior to the time of the injury, the "falls" extended from either side of the pile-driver at the top down to ropes attached to posts or timber-heads on the scow west of the pile-driver. Each set consisted of two sheave-blocks and the necessary rope to form four strands when in position on the pile-driver, and a hauling line by means of which the strands could be loosened or tightened and the distance between the sheave-blocks increased or diminished. One sheave-block of each set of "falls" was fastened or hooked to the top of the pile-driver and the other to a rope, referred to as a pennant line, which was fastened to the timber-head or post on the scow west of the pile-driver. The hauling line was fastened to the bed-sill of the pile-driver. In order to unfasten the sheave-block from the top of the pile-driver or from the pennant line, it was necessary to first release the hauling line from the bed-sill, whereby the ropes of the "falls" would become slack.

Upon reaching the scow the plaintiff immediately started up the ladder of the pile-driver, without having had any conversation with Morphew concerning the work to be done by either in taking down the sheave-blocks. While plaintiff was ascending the ladder Morphew unfastened the hauling line of the south set of "falls." Plaintiff, upon reaching the top of the pile-driver, unfastened the sheave-block of that set of

"falls," and Morphew, standing on the scow, detached the sheave-block of the same set from the pennant line which connected it with the timber-head. Plaintiff brought the sheave-block removed by him down the ladder to the scow and he and Morphew, by pulling on the ropes, brought the two sheave-blocks, removed by them, together, and Morphew carried them from the scow to the land, and proceeded to prepare a guy line to replace the "falls" which had just been removed, while plaintiff again ascended the ladder to remove the other sheave-block which was attached to the pile-driver. A strong wind was blowing and the scow was rocking at this time. When Swift reached the top of the pile-driver, and while attempting to detach the sheave-block from its fastening, the pile-driver fell over to the east into the river, carrying plaintiff with it, and he received the injuries complained of.

After the injury it was found that the hauling line of the north or remaining set of "falls" had been unfastened from the bed-sill, or that the line had broken, and this had allowed the rope to run back through the sheave-block and had prevented the "falls" from holding the pile-driver. Plaintiff and Morphew were the only persons on the scow, and both denied having released the hauling line from the bed-sill. The testimony of appellee indicates that the line broke, thus permitting the fall of the pile-driver. After removing the first set of "falls," no lines, ropes or other supports were fastened to the pile-driver to take its place. The bolts fastening the pile-driver to the scow pulled out of the timbers of the scow when the pile-driver fell into the river.

Plaintiff had never worked on the pile-driver in question, had never seen it in operation and had not been on the scow prior to the time he was injured, nor had he received any information concerning the pile-driver or its fastenings other than what he observed on this occasion. He had seen pile-drivers before and had worked around them. Prior to this time he had worked for the Wabash railroad for a period of eight months, during all of which time the train which he

accompanied had a pile-driver attached to one of its cars. He had also worked about pile-drivers for the Rock Island railroad, and a few weeks previous to the time he was injured had worked for the defendant at another place where a pile-driver was being used.

At the close of plaintiff's evidence in chief and again at the close of all the evidence in the case, the defendant moved the court to instruct the jury to find the issues for defendant, which motion in each instance was accompanied by a peremptory instruction in writing. The court refused each instruction, and its action in so refusing the peremptory instruction at the close of all the evidence is assigned as error. The action of the trial court in sustaining the demurrer to defendant's plea of the Statute of Limitations is also assigned as error.

W. A. HOWETT, (J. G. DRENNAN, of counsel,) for appellant.

FRANCIS W. WALKER, and AL. G. WELCH, for appellee.

Mr. JUSTICE SCOTT delivered the opinion of the court:

Appellant duly excepted to the action of the court in overruling its motion made at the close of all the evidence for a peremptory instruction directing the jury to find for the defendant, and now seeks to present to this court the question whether there is in this record any evidence which, with the inferences reasonably to be drawn therefrom, is sufficient to warrant a verdict for the plaintiff. Appellee urges that this question is not now open for consideration upon this record. His position in that regard and the views of the Appellate Court for the First District upon that subject are concisely stated in the following language from the opinion of that court in this cause:

"At the request of the appellant's counsel the court gave nineteen instructions which, in differing language, submitted

as questions of fact to be determined by the jury every contested issue in the case, including the assumption of risk, contributory negligence of appellee, and the negligence of appellant. This being the state of the record, appellant can not now be heard to say that there was error in submitting the cause to the jury on either of these questions. The instructions referred to conceded, in effect, that there was evidence tending to establish the plaintiff's case on these issues, and appellant is precluded from asserting the contrary in this court."

This view of the law is incorrect. The motion for a peremptory instruction presents a pure question of law, and, in the event of an adverse ruling, an exception preserves that question of law for the consideration of an appellate tribunal. After that adverse decision the defendant may argue to the jury that its guilt is not shown by a preponderance of the evidence, which is purely a question of fact, and the submission of that question of fact to the jury by instructions offered by the defendant does not waive the question of law already passed upon by the court where the defendant's rights have been properly preserved. This has been the universal practice in this State for many years and will not now be disturbed.

The language used by this court in each of the cases of *Consolidated Coal Co. v. Haenni*, 146 Ill. 614, and *Chicago Terminal Railroad Co. v. Schmelling*, 197 id. 619, in so far as inconsistent with the views herein expressed, was not necessary to the disposition of the question then before the court.

In support of this motion it is urged that the evidence fails to show that plaintiff was in the exercise of due care. A careful examination of the proof leads us to the conclusion that it lacks in this respect. Considering only the evidence favorable to appellee, it appears that the pile-driver, thirty-six feet in height, stood upon the east end of the scow, which was depressed by the weight, and that depression caused the structure to lean to the east. It did not fall eastward prior

to the time appellee first climbed thereon, for the reason that it was guyed by ropes passing through the sheave-blocks near the top of the pile-driver and attached to posts or timber-heads on the scow west of the pile-driver. It appears from the testimony of appellee that his knowledge of pile-drivers was such that had this pile-driver been standing on the ground he would have known that guy lines were necessary to keep it in an upright position, but that he supposed as it stood upon the scow they might not be necessary. No reasonable ground for such supposition is shown. The pile-driver was in fact not otherwise secured except by bolts and plates designed exclusively to keep it from working back and forth or from side to side while in use on the scow.

Under these circumstances, without attaching other lines to keep the pile-driver from falling, the appellee detached one of the sheave-blocks and with it the lines on that side of the pile-driver, and says: "I discovered, when I went up to unhook the first block, that the waves and water caused the barge to rock around some; the driver being pretty high up made it wave around," and then having taken away one-half the lines which kept it in an erect position, he remounted the leaning pile-driver and attempted to detach the sheave-block carrying the remaining lines, and while so engaged observed what he says was the end of a broken rope passing through the sheave-block, found the pile-driver falling to the east and his injury followed consequent upon the fall.

Any person of intelligence, accustomed to working about pile-drivers, would know that this one, already leaning to the east and rocked by the winds and waves, would be liable to topple over unless supported by lines or braces. The falls consisted of four lines on each side passing from sheave-blocks at the top of the structure to posts on the scow west of the west end of the bed-sills. These lines were plainly visible. It would seem they could not be overlooked, and the most casual observation would show that they were necessary to the support of the pile-driver. Appellant had the

right to assume that appellee, a man of mature years, was possessed of ordinary mental faculties, the usual powers of observation and such knowledge as is acquired by common experience. (*Ruchinsky v. French*, 168 Mass. 68.) Such a man, exercising his senses, in broad daylight, in the situation in which appellee was, with his familiarity with pile-drivers, would perceive that this particular pile-driver was in danger of falling if the lines were removed. Failure to discover so obvious a danger could result only from negligence.

In support of the action of the trial court in refusing to direct a verdict for the defendant, it is urged by appellee, in the language of this court in *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447, "the master is liable, where the servant is injured by a temporary peril to which he is exposed by the positive negligent act of the employer without any negligence on the part of the servant," and it is stated that recovery is sought on the principle that the master must not expose the servant to danger.

The place in which, and the appliances with which, appellee was directed to perform the service in question were not dangerous. The danger was created by the manner in which the servant performed the task. Here the superintendent was not present when the work was done; the command was given at a considerable distance, at least one hundred and fifty feet, from the place where the duty was to be performed, and the servant was at liberty, when he reached the scow, to go about the performance of the task in the manner that seemed to him best. Ropes were lying upon the scow which could have been used to secure the pile-driver before either sheave-block was removed. In fact, it appears that appellee's fellow-workman, to whose attention the danger was not called as sharply as it should have been to that of appellee for the reason that the duty of ascending the pile-driver devolved upon the latter, contemplated attaching a guy line to the pile-driver before an attempt was made to remove the last sheave-block.

Where the servant is specifically directed by his superior to do the work in a dangerous manner, and injury results, he may recover, unless, indeed, the danger was so imminent that a reasonably prudent man would not have incurred it. (*Illingis Steel Co. v. Schymanowski*, *supra*; *Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573; *West Chicago Street Railroad Co. v. Dwyer*, 162 id. 482; *Illinois Steel Co. v. Wierzbicky*, 206 id. 201.) Where, however, the employee is not directed to do the work in a specific manner, but is given a general order to perform the task and is himself left to use his own discretion as to the manner in which the work shall be done, and there exists a safe way and a dangerous way, which are equally open to him, if he selects the unsafe method through heedlessness or because it involves less exertion on his part, and injury to his person results, he cannot recover. *Pennsylvania Co. v. Lynch*, 90 Ill. 333; *Illinois Central Railroad Co. v. Sporleder*, 199 id. 184.

It is further suggested, however, that the breaking of the rope in the left-hand set of falls was the proximate cause of the injury, and that the doctrine of *res ipsa loquitur* applies. The meaning of this term is that the thing itself speaks; that is, that the accident itself raises a presumption of negligence on the part of the defendant, which he must rebut by showing that he took reasonable care to prevent the happening of the accident. The doctrine only applies, however, where the machine, appliance or other thing from which the injury results is shown to be under the management of the defendant and the accident is such as in the ordinary course of things does not happen if those in control use proper care. (1 Addison on Torts, sec. 33; *North Chicago Street Railway Co. v. Cotton*, 140 Ill. 486; *Chicago City Railway Co. v. Barker*, 209 id. 321.) The doctrine does not apply here for the reason that the accident did not result from the condition in which the defendant placed and left the pile-driver. The ropes that held it, as it had been left prior to the time the appellee approached it, were sufficient to maintain it in an

upright position. Had the ropes broken and the pile-driver fallen while appellee was ascending the first time and before either of the sheave-blocks had been removed, there would have been some ground for invoking the doctrine; but here the person injured had removed one-half the lines which the defendant had attached to the pile-driver for the purpose of sustaining it in an upright position, and after doing that he climbed again up the leaning pile-driver, which, deprived of one-half the support which the defendant had provided, with its tendency to fall to the east, in which direction it was leaning, increased by the weight of appellee, fell and the injury resulted. As between plaintiff and defendant the pile-driver was not under the sole control or management of the defendant. On the contrary, the plaintiff was himself engaged in altering the condition in which it had been placed by the defendant. Under this state of the proof, it is not to be presumed that the rope was old and rotten or otherwise defective and that the defendant had actual or constructive notice of that fact.

We are constrained to hold that the accident was the direct consequence of two acts of the appellee, viz., removing the sheave-block and the lines which it carried, and thereafter climbing upon the structure without first attaching another guy line or otherwise giving support to the pile-driver, and that in doing these acts he did not exercise ordinary care for his personal safety.

The plea of the Statute of Limitations seems to have been interposed as to all the additional counts of the declaration. It did not present a defense to all of them and we are therefore unable to say that the court erred in sustaining the demurrer to that plea.

The judgment of the Appellate Court and the judgment of the circuit court will be reversed and the cause will be remanded to the circuit court.

Reversed and remanded,

AMY ROWE, Admx.

v.

THE TAYLORVILLE ELECTRIC COMPANY.

Opinion filed December 22, 1904.

1. **ELECTRIC COMPANIES**—*the use of electricity for profit requires care commensurate with danger.* Electricity is a silent, deadly and instantaneous force, and a company handling it is bound to know the dangers incident to its use in public streets, and while such a company is not an insurer of the safety of the public, it is bound to guard against accidents by care commensurate with the danger.

2. **SAME**—*when recovery cannot be had for defective insulation.* Defective insulation of an electric light wire does not give rise to an action for negligence against the electric light company for the death of a telephone lineman who, with full knowledge of the conditions and dangers, allowed a telephone wire to come in contact with an electric light wire, thinking there was no current turned on.

3. **SAME**—*company owes no duty to public to give warning before turning on current.* Failure of an electric light company to blow its whistle before turning on its current, as it was in the habit of doing to warn its own employees, is not a breach of duty towards other persons, where there is no proof of an agreement or understanding that the warning is to be given for their benefit or that the company knew they were relying thereon.

APPEAL from the Appellate Court for the Third District;—heard in that court on writ of error to the Circuit Court of Christian county; the Hon. TRUMAN E. AMES, Judge, presiding.

SHARROCK & GRUNDY, and LANE & COOPER, for appellant.

PERCY WERNER, (J. E. HOGAN, of counsel,) for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Albert Rowe was employed by the Central Union Telephone Company, in the city of Taylorville. On January 4, 1902, the appellee, the Taylorville Electric Company, owned

and operated an electric light plant in said city which had been in operation about eight years. The telephone company had secured a license to erect telephone poles, with wires, on the streets of said city, and on said day Rowe and five other employees of that company were at work stringing wires on poles in North street. The poles were set on the same side of the street as those of the electric company, but were higher. The poles of the electric company were twenty-five feet high and those of the telephone company thirty feet, so that the telephone wires would be about five feet above the electric wires. When the electric wires were not carrying any current of electricity there was no danger in working above them, but when the current was turned on it was dangerous. They were calculated to carry a current of one thousand volts, and five hundred volts would be fatal to one coming in contact with them. In stringing the telephone wires one of them broke and Rowe went down a pole and brought it up again. He was on the pole about twenty-five feet from the ground, stretching the wire, when it came in contact with the parallel electric light wire in which there was a current of electricity, and he received a shock causing him to fall from the pole upon the frozen ground. His hands were badly burned, his neck was broken and he was dead when his companions reached him. His widow and administratrix, the appellant, sued the appellee in the circuit court of Christian county for damages resulting from his death. In the first count of her declaration she charged defendant with negligence in permitting its current of electricity to escape and be transmitted to the telephone wire which the deceased was handling. The second count charged defendant with negligence in turning on the current of electricity without giving a customary warning by a whistle from its engine. The third alleged that the defendant knew that the employees of the telephone company only did their work when the current was not turned on, and notwithstanding this knowledge neglected to give warning of its intention to turn on the cur-

rent. The fourth charged negligence in using imperfectly insulated wires. The fifth charged negligence, generally, in constructing, maintaining, managing and operating the electric light plant. An additional count set forth that it was the custom of defendant to sound a whistle five minutes before turning on its current and that the telephone employees relied upon such custom, and it charged negligence in turning on the current without warning. The plea was not guilty. At the conclusion of all the evidence the court, at the instance of the defendant, directed the jury to return a verdict of not guilty. A verdict was returned accordingly, upon which judgment was entered. Upon a writ of error from the Appellate Court for the Third District the judgment was affirmed. The Appellate Court granted a certificate of importance and an appeal to this court.

The question to be determined is whether the court erred in not submitting the issue to the jury and in directing a verdict of not guilty. That depends upon whether there was evidence fairly tending to prove a cause of action against the defendant. The evidence tended to prove the following facts: The defendant had operated its electric light plant in the city of Taylorville for eight years, and the wire at the place of the accident was second-hand when it was put up. The insulation of the wire was old and worn generally, and it was off and the wire was bare at a place called a "joint," where the accident occurred. The electric light current was not turned on at all times, but was turned on at different hours in different seasons and on clear or cloudy days. When it was dark and cloudy it was kept on all day, and on clear days at the time of year this accident occurred it was turned on about four o'clock in the afternoon. The day of the accident was clear and bright. It had been the custom of the defendant to blow its whistle about five minutes before turning on the current to notify its employees, so that if they were doing anything about the wires they would finish it and get away before the current was turned on. The acci-

dent occurred about fifteen minutes before four o'clock, according to the watch of one of the men who looked at it at the time. The telephone men did not expect that the electric current would be turned on the wires until four o'clock and they expected to get through before the current started. There was no signal given before turning on the current on this occasion. Sometimes the telephone men would telephone the electric light plant or secretary and treasurer to learn what time the current would be turned on, but they also depended on hearing the whistle, and were governed as to the time to quit work by that signal. Rowe had been working for the telephone company about six months and was experienced in the business. When the telephone men knew that the electric wires were carrying the current, they had means, by the exercise of extra care, of keeping the telephone wires off the electric wires, and they all understood the danger from having the wires come in contact with each other. It was known to the manager of the defendant that telephone wires were being put up in the streets, and about three-quarters of an hour before the accident the engineer of defendant passed near where the telephone men were at work and in view of them, but there was no evidence that the defendant or any of its employees knew that the men were still at work at the time the current was turned on. The telephone men had no intention of continuing their work when the electric current was on the wires, and they were watching for the signal of the whistle and also looking at their watches to learn the time of day. One of the gang of men had just looked at his watch and put it back in his pocket when the accident occurred. Rowe was supplied with a safety strap by which to fasten himself to a pole when working with both hands, and he was not using it at the time the accident occurred.

It is contended that the uncontradicted evidence proved Rowe to have been guilty of negligence in not using the strap to fasten himself to the pole when using both hands

with the wire. If he had used it he would not have fallen, and his neck was broken by the fall of twenty-five feet upon the frozen ground, but there was evidence tending to prove that the electric shock was fatal. If the shock was sufficient to kill him it was immaterial whether he fell or not. The court would not have been justified in directing a verdict on the ground that he was guilty of contributory negligence in not using the strap.

The other question is whether the evidence tended to prove actionable negligence on the part of the defendant, and the first question discussed by counsel is whether the condition of the electric wires, as to insulation, tended to prove such negligence. Counsel for appellee say that the duty to maintain perfect insulation does not extend to the entire system of wires, but only to places where the defendant might reasonably anticipate that persons would go for work, pleasure or business; that the duty did not extend to wires strung twenty-five feet above the ground simply because there was a possibility that some person in pursuit of his own business would bring himself in contact with a wire, and that there was no duty to keep wires in safe condition as to telephone employees entering upon the premises on their own business. Electricity is a silent, deadly and instantaneous force, and one who uses it for profit is bound to exercise care corresponding to the dangers incident to its use. One duty is the insulation of its wires, but that duty does not extend to the entire system. No duty of that kind is imposed on the owner on his own premises as to trespassers or bare licensees, who are neither invited upon the premises nor there for purposes of business with the owner. The defendant was not bound to assume that persons would come upon its private premises who were not invited there or brought there by business and thereby expose themselves to injury. But the streets of the city were not the private premises of defendant. The streets belong to the public, and the public, generally, have a right to use them. As a matter

of fact, the defendant must be held to have anticipated that the public would use the streets as they had a right to do, and also the employees of the telephone company would be working in the streets in the business of that company and might come in proximity to its wires in attending to their duties. The defendant was not an insurer of the safety of the public, but it was bound to know the dangers incident to the use of the streets by it and to guard against such dangers by the exercise of care commensurate with them.

Counsel rely upon the decision in *Hector v. Boston Electric Light Co.* 161 Mass. 558, as sustaining the doctrine contended for, but it clearly does not. We explained in *Commonwealth Electric Co. v. Melville*, 210 Ill. 70, that in the case referred to the plaintiff received his injuries while on a roof of a building where he had no right to be and was neither invited nor licensed to be, and we decided that a company operating wires carrying a dangerous current of electricity owes a duty to exercise reasonable care to prevent injury to others, wherever they have a right to go. The duty extends to every place where persons have a right to be, whether for business, convenience or pleasure. The condition of the electric wire as to insulation tended to prove negligence on the part of the defendant which would give rise to a cause of action for an injury to one not aware of the danger, who had a right to rely upon the wire being properly insulated. The evidence, however, was that the telephone men were familiar with the danger and had no intention of working when the electric current was on the wires. The evidence was uncontradicted that they were not relying upon the performance of any duty to insulate the wires and fully knew and understood the dangers arising from the defective insulation. If they knew that the electric wire was carrying a deadly current, and Rowe, with full knowledge of the conditions and dangers, allowed the telephone wire to come in contact with the electric wire, there could be no recovery on the ground that the insulation was defective. It

was only on account of his ignorance of the current having been turned on that the accident occurred.

The only question, therefore, is whether the failure of the defendant to blow the whistle before turning on the current rendered it liable in the case. The signal which the defendant was in the habit of giving by blowing the whistle, was for the benefit of its own employees, so that if they were at work about the wires they would hurry and get through before the current was turned on. There was no evidence tending to prove any agreement between the companies with respect to giving signals or any knowledge on the part of the defendant that the telephone men were relying upon them. Neither was there any evidence of notice to the defendant that the telephone men were at work at that time. If there was a duty of the defendant to give a warning it was one which extended to everybody, and required the blowing of the whistle to give general notice that it was about to start up the plant. It would not be contended that there was such a duty as that, or that the defendant would be guilty of negligence in failing to give such notice to the public at large. The telephone men did not expect the plant to start until four o'clock and they were calculating to finish their work before that time, although they also expected to hear the whistle before the current was turned on. In the absence of any proof tending to show an agreement or understanding that the signal would be given for the benefit and safety of the telephone men or that the defendant knew they were relying upon the whistle as a warning, we do not think there was a duty to give the warning. If there was no duty the telephone men had no legal right to rely upon notice by the whistle, and a failure to give it did not charge the defendant with negligence. It follows that the court did not err in giving the instruction.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

JACOB GLOS

v.

HARRIS STERN.

218	325
214	419

Opinion filed December 22, 1904—Rehearing denied Feb. 8, 1905.

1. **APPEALS AND ERRORS**—*when freehold is involved.* A proceeding to cancel a tax sale certificate, and any tax deed issued thereon, involves a freehold, where the period of redemption has expired, the defendants claim title under a tax deed issued on the certificate, and the decree orders the tax sale certificate, and any deed issued thereon, set aside. (*Gage v. Busse*, 94 Ill. 590, distinguished.)

2. **SAME**—*when alleged error in canceling tax sale certificate is harmless.* Alleged error in decreeing cancellation of a tax sale certificate after a tax deed has been issued thereon is harmless, where the deed itself is properly canceled.

3. **COSTS**—*when defendant to bill to remove cloud is liable for a portion of costs.* Refusal of the defendant to a bill to cancel a tax deed as a cloud to accept a tender of all he was entitled to, thus rendering a reference to the master necessary, authorizes the court to require him to pay all costs occasioned by such refusal.

APPEAL, from the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

Harris Stern, on the 9th day of July, 1903, filed a bill in chancery in the circuit court of Cook county against Jacob Glos to set aside as a cloud upon his title to lot 5, in block 2, in Brainard & Evans' addition to the city of Chicago, a tax sale certificate based upon a tax sale made in the year 1900 for a delinquent special assessment upon said lot falling due in the year 1899; also to cancel any tax deed which may have been issued at the time of the filing of the bill upon said tax sale certificate. The bill averred that complainant was the owner of said premises in fee and was in possession thereof, and that said tax sale certificate was void by reason of the failure of Glos to comply with the requirements of the statute authorizing the same to issue, specifying wherein, and prayed that the tax sale certificate, and any tax deed

that may have been issued thereon, might be set aside as a cloud upon his title. The bill made any unknown owners of said tax sale certificate, claiming any interest in the premises through said certificate or any unrecorded deed issued thereon, parties defendant, and prayed the same relief as against said unknown owners as was prayed against Jacob Glos. Jacob Glos appeared and filed an answer, in which he averred title in himself and Emma J. Glos by virtue of said tax sale certificate and a tax deed issued thereon. The appellee then tendered to Jacob Glos, in open court, the amount of the tax sale, interest, penalty and cost, which was refused by him and the amount tendered was deposited in court. The case was thereupon referred to a master in chancery. The evidence in support of the bill was taken and a report was filed by the master, wherein he found the material allegations of the bill to be true, and a decree was entered in accordance with the prayer of the bill, and the costs were apportioned between the appellant and appellee, and Jacob Glos has prosecuted an appeal to this court.

JACOB GLOS, *pro se*, (JOHN R. O'CONNOR, of counsel.)

WILLIAM A. ADAMS, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

The contention is made by appellee that the case should have gone to the Appellate Court, as it is said no freehold is involved. The period of redemption had expired at the time the bill was filed, and appellant averred in his answer that he and Emma J. Glos claimed title to said premises by virtue of a tax sale thereof and a deed issued thereunder, and the decree ordered said tax sale certificate, and any deed issued thereon, so far as it related to the property in question, canceled and set aside. This case differs from the case of *Gage v. Busse*, 94 Ill. 590, relied upon by appellee, in this: In that case no claim was made that a deed had

been issued upon the tax sale certificate, and the sole effect of the decree rendered in that case was to cancel the tax sale certificate. We are of the opinion a freehold is involved and that the case was properly brought to this court.

The appellant contends that at the time the bill was filed the time of redemption had expired and a deed had been made to the appellant, and that said tax sale certificate had thereby become inoperative, and that a bill in chancery will not lie to set aside and cancel a tax sale certificate after a deed has been issued thereon. The bill was not filed alone to cancel the tax sale certificate, but also to cancel any tax deed which might have been issued, based thereon. The bill was not attacked as being multifarious, and the appellant having admitted in his answer that he and Emma J. Glos claimed title to said premises by a tax deed based upon said tax sale certificate, he is not now in a position to complain that the tax deed by which he claims to hold said premises, and which is based upon a void tax sale certificate, has been set aside, by reason of the fact that the decree also cancels the tax sale certificate. If it was error to cancel the tax sale certificate because a deed had been issued thereon the error was harmless, and the cause should not be reversed for that reason as the tax deed was properly canceled.

It is further contended that the bill does not sufficiently describe the deed sought to be set aside. The deed is described as a deed based upon a certain tax sale certificate, which was specifically described. There could be no mistake as to the deed referred to, as but one deed could be issued upon said tax sale certificate.

It is next contended that the court erred in requiring the appellant to pay a portion of the costs. We think the court did not err in apportioning the costs in this case. When the case was at issue the appellee offered to pay to the appellant all he was entitled to receive, which he refused to accept. A reference to the master by reason of such refusal, and the subsequent steps in the case, were made necessary, and there

was no injustice to the appellant in requiring him to pay all costs occasioned by his wrongful conduct. *Gage v. DuPuy*, 137 Ill. 652.

The contention of the appellant that the certificates attached to the certified copies of the judgment record and other records offered in evidence were insufficient is without force. The form of the certificates was, "that the foregoing is a true copy, * * * in so far as said record relates to the premises described in the foregoing copy." If the last clauses of the certificates, which are those to which objection is made, were omitted the certificates would be untrue, unless the clerk incorporated into the copies of said records a description of all the property similarly situated to the property in question, located in Cook county. This the law did not require.

We find no reversible error in this record. The decree of the circuit court will therefore be affirmed.

Decree affirmed.

JOHN GRANAT

v.

SIMON KRUSE *et al.*

Opinion filed December 22, 1904.

1. APPEALS AND ERRORS—*right to writ of error must appear from the record.* No person can sue out a writ of error who is not a party to the record or in privity with such party or who is not shown by the record to be prejudiced by the judgment.

2. SAME—*plaintiff in error may dismiss writ.* A plaintiff in error has the same right to dismiss a writ sued out in his name as he has to dismiss a suit begun by him in court of original jurisdiction.

3. SAME—*Supreme Court cannot hear extrinsic evidence to determine whether person is prejudiced by judgment.* Whether a person is so prejudiced by the judgment as to entitle him to resist the dismissal of the writ of error by the person in whose name it was sued out is a question which must be determined from the record, and not from affidavits or other extrinsic evidence.

WRIT OF ERROR to the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. FRANK BAKER, Judge, presiding.

MUSGRAVE, VROMAN & LEE, for plaintiff in error.

EDMUND S. CUMMINGS, for defendants in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Defendants in error, Simon Kruse and Thomas J. Peden, composing the firm of Kruse & Peden, brought suit in the circuit court of Cook county against plaintiff in error, John Granat, upon the following written contract:

"Articles of agreement between Kruse & Peden and John Granat, 131 Townsend street.

CHICAGO, ILL., *April 4, 1901.*

"Whereas, on the 10-14th day of July, 1899, I, John Granat, received a personal injury for which I hold a claim against Brand Brewing Company and M. L. Barrett & Co.; and whereas, I have this day employed Kruse & Peden as my attorneys and have authorized and directed them to prosecute said claim:

"Now, therefore, it is agreed between the parties hereto as follows:

"*First*—Kruse & Peden shall use their best skill and efforts to prosecute said claim to a successful issue, and shall receive for their services a sum equal to fifty per cent of the value of what may be recovered on said claim.

"*Second*—If nothing is recovered on said claim, then Kruse & Peden are to receive nothing.

"*Third*—I agree not to settle or compromise without the consent of Kruse & Peden, and to be guided by their judgment and advice, and Kruse & Peden are not to settle or compromise said claim without my approval and consent.

"In case judgment is obtained, it is further agreed that said judgment be assigned to Kruse & Peden, with the understanding that all expenses of the case are to be paid out of the fifty per cent agreed upon as being Kruse & Peden's share of the judgment, and the other fifty per cent to be paid Mr. Granat free of any expense.

JOHN GRANAT,
KRUSE & PEDEN,

Witness: Mrs. Gertrude B. Davies.

Per T. J. Peden."

This contract was set out in a special count of the declaration, and it was averred that under and by virtue of it the plaintiffs commenced suit against the Brand Brewing Company and M. L. Barrett & Co. in the circuit court of Cook county; that the defendant, Granat, who was plaintiff in that suit, settled his claim against the Brand Brewing Company and M. L. Barrett & Co. and received \$3800 and executed a release of his cause of action, and that plaintiffs thereupon became entitled to \$1900, one-half of said sum of \$3800. The defendant demurred to the special count, and the demurrer being overruled, the common counts were withdrawn and he elected to stand by his demurrer. There was a judgment for \$1900 against him, and he appealed to the Appellate Court for the First District, where the cause was assigned to the branch of that court and the judgment was affirmed. The writ of error in this case was sued out to review the judgment of the Appellate Court.

A stipulation of plaintiff in error and defendants in error that the writ of error may be dismissed has been filed, and defendants in error have moved the court to dismiss the writ in accordance with such stipulation. The motion is resisted by the attorneys appearing for plaintiff in error for reasons set forth in an affidavit of M. L. Barrett. It appears from that affidavit that upon a settlement of the original suit of Granat for personal injuries against the Brand Brewing Company and M. L. Barrett & Co., it was agreed by M. L. Barrett & Co., one of the defendants, that it would hold Granat free from all liability to Kruse & Peden for attorneys' fees; that by virtue of that agreement M. L. Barrett & Co. are bound to indemnify plaintiff in error against any claim of Kruse & Peden for such fees; that M. L. Barrett & Co. attempted to agree with Kruse & Peden upon a reasonable fee for their services rendered to Granat, but were unable to do so; that thereupon the suit of Kruse & Peden against Granat was brought upon the said written contract, which M. L. Barrett & Co. claimed to be champertous, illegal

and void; that Granat served notice upon M. L. Barrett & Co. requiring them to defend the suit against him because of said contract of indemnity; that M. L. Barrett & Co. assumed the defense of the suit and filed the demurrer and elected to stand by it and took the appeal to the Appellate Court; that the bond was signed by M. L. Barrett, and the company perfected the appeal; that said company incurred expenses for disbursements and attorneys' fees, and upon affirmance of the judgment by the Appellate Court prayed an appeal to this court; that Granat, acting under the advice of Kruse & Peden and Edmund S. Cummings, who was interested with them, refused to execute the appeal bond and perfect the appeal; that he notified the company that he did not wish any further proceedings taken in his behalf in the suit and his name must not be used for the purpose of suing out a writ of error or any other purpose; that the writ of error was then sued out in his name by the attorneys employed by M. L. Barrett & Co. who had defended the suit in the trial court and prosecuted the appeal to the Appellate Court. These facts are not denied by defendants in error, and it is insisted in opposition to the motion to dismiss, that on account of the relation of M. L. Barrett & Co. to the suit that corporation had a right to sue out the writ of error, and that it ought not to be dismissed on motion of plaintiff in error.

The suing out of a writ of error is the beginning of a new suit, and a plaintiff in error has the same right to dismiss a writ sued out in his name that he has to dismiss a suit begun by him in a court of original jurisdiction. A writ of error is a writ of right by the common law, but the right is limited to parties to the action or their legal representatives, or one whose privity of estate, title or interest appears from the record. No person can sue out a writ of error who is not a party or privity to the record or who is not shown by the record to be prejudiced by the judgment. (*In re Sturms*, 25 Ill. 338; *McIntyre v. Sholty*, 139 id. 171; 2 Cyc. 626.)

In this case the relation of M. L. Barrett & Co. to the suit does not appear from the record but only from the affidavit filed in the case. It appears from the affidavit that that corporation, being bound to indemnify Granat against the claim of Kruse & Peden, was notified to assume the defense of the action and did so, but that after the judgment of the Appellate Court Granat refused to permit them to prosecute an appeal or sue out a writ of error, or proceed further in the defense against the claim, or seek a reversal of the judgment. We have no jurisdiction to hear and determine such questions or to make them the basis of our action. The record certified to this court speaks for itself, and we cannot hear extrinsic evidence to determine whether a party seeking a reversal is aggrieved by the judgment. (*Hauger v. Gage*, 168 Ill. 365.) In the case of *Anderson v. Steger*, 173 Ill. 112, the circuit court ordered the defendant, Steger, to pay to the plaintiff in error, Anderson, \$1073. Although Anderson was not a party to the suit, the record showed that he was injured by the judgment of the Appellate Court reversing that decree, and it was on that ground he was permitted to sue out the writ of error.

The writ of error is dismissed.

Writ dismissed.

218 382
214 * 62

BLANCHE SHARP

v.

ROBERT PEARL SHARP *et al.*

Opinion filed December 22, 1904—Rehearing denied Feb. 8, 1905.

1. WILLS—*bill to contest will can be maintained only under section 7 of Wills act.* A bill in chancery to contest a will and set aside the probate thereof can be maintained only by virtue of the proviso to section 7 of the Statute of Wills.

2. SAME—*act in force when bill is filed controls the matter of time.* The statute limiting the time for filing a bill to contest a will which is in force at the time the bill is filed controls the right of complainant, and not the statute in force when will was probated

3. SAME—*act of 1903, reducing time limit for contesting wills, is retroactive.* The act of 1903, (Laws of 1903, p. 355,) limiting the time for contesting a will to one year after its probate, applies to all bills filed after the act took effect, notwithstanding the wills contested were probated before the act was in force.

4. VESTED RIGHTS—*a party has no vested right in statute giving right to contest will.* The probate of a will does not confer upon interested parties the right to have the then existing statute conferring the right to file a bill to contest the will and fixing the time limit therefor remain unchanged or unrepealed.

APPEAL from the Circuit Court of Bureau county; the Hon. RICHARD M. SKINNER, Judge, presiding.

This was a bill in chancery filed on the 9th day of January, 1904, in the circuit court of Bureau county, by the appellant, against the appellees, to set aside the will, and the probate thereof, of Robert Sharp, deceased, on the ground of mental incapacity and undue influence. The bill alleged that Robert Sharp executed said will on the 4th day of January, 1902; that he died on the 13th day of the same month; that the will was admitted to probate on the 24th day of February, 1902; that he left him surviving the complainant, and Robert Pearl Sharp and Martha Sharp, his children and sole heirs-at-law; that by the terms of the will he gave to the complainant five dollars, to Martha Sharp the use of the remainder of his estate during her natural life, and upon her death the fee thereof to Robert Pearl Sharp; that he nominated John E. Pickering executor of his will, who qualified as such, and that Martha Sharp died unmarried and without issue on December 4, 1902; also the mental incapacity of the testator, and that the execution of the will was brought about by the undue influence of Robert Pearl Sharp and Martha Sharp. A demurrer was interposed to the bill on the ground that it was filed more than one year after the probate thereof, and for that reason it appeared from the face of the bill that the court was without jurisdiction to hear and determine the case. The demurrer was sustained and the bill dis-

missed, and the testator having died seized of real estate the title to which was disposed of by said will, an appeal has been prosecuted by the complainant direct to this court.

CHAS. F. DAVIES, and SOL ROSENBLATT, for appellant.

WATTS A. JOHNSON, for appellees.

Mr. JUSTICE HAND delivered the opinion of the court:

The bill was filed one year, ten months and fifteen days after the will was admitted to probate, and the sole question presented to this court for determination is, was the bill filed in time? It has been repeatedly held by this court that a bill in chancery to contest a will and to set aside the probate thereof can only be maintained in this State by virtue of the proviso to section 7 of the Statute of Wills. (*Luther v. Luther*, 122 Ill. 558; *Wheeler v. Wheeler*, 134 id. 522; *Sinnet v. Bowman*, 151 id. 146; *Jele v. Lemberger*, 163 id. 338; *Keister v. Keister*, 178 id. 103.) In *Chicago Title and Trust Co. v. Brown*, 183 Ill. 42, on page 49 it was said: "Courts of equity in this State have no jurisdiction to contest a will or impeach a judgment of probate except such jurisdiction as has been conferred by the statute. Indeed, the statute conferring jurisdiction is the only source of power entrusted to a court of equity in this State. (*Luther v. Luther*, 122 Ill. 558; 2 Freeman on Judgments, secs. 484a, 608.) Such being the case, a court of equity can only entertain a bill in the mode and within the time prescribed by the statute."

The proviso above referred to, as it existed in the act of 1872, read as follows: "*Provided, however*, that if any person interested shall, within three years after the probate of any such will, testament or codicil, in the county court as aforesaid, appear, and by his or her bill in chancery, contest the validity of the same, an issue at law shall be made up, whether the writing produced be the will of the testator or

testatrix or not; which shall be tried by a jury in the circuit court of the county wherein such will, testament or codicil shall have been proven and recorded as aforesaid, according to the practice in courts of chancery in similar cases; but if no such person shall appear within the time aforesaid, the probate as aforesaid shall be forever binding and conclusive on all the parties concerned, saving to infants, *femes covert*, persons absent from the State, or *non compos mentis*, the like period after the removal of their respective disabilities." (2 Starr & Cur. Stat.—1st ed.—p. 2470.) By an amendment passed in 1895 the time allowed for filing a bill to contest a will and the probate thereof was reduced to two years, and the words "*femes covert*, persons absent from the State," were omitted from the saving clause of said proviso. By a further amendment, which was approved on April 11, 1903, and went into force on July 1, 1903, the time in which such a bill might be filed was limited to a period of one year from the time of the probate of the will. (Laws of 1903, p. 355.)

In *Spaulding v. White*, 173 Ill. 127, and *Storrs v. St. Luke's Hospital*, 180 id. 368, it was held that the act in force at the time the bill was filed, and not the act in force at the time the will was admitted to probate, governed the time within which a bill to contest a will and the probate thereof must be filed. The basis of these decisions is, that the proviso in said section 7 is not a limitation law, but a law conferring jurisdiction and fixing the time within which it may be exercised. In *Spaulding v. White*, *supra*, on page 130, it was said: "There is a material distinction between a statute conferring jurisdiction and fixing a time within which it may be exercised, and a statute of limitations. The seventh section, as it stood before this amendment, conferred jurisdiction on a court of chancery to entertain a bill to contest a will. The act as it stood prior to the amendment gave no vested right to anyone interested, who desired to contest a will, to have the full term so fixed within which a court should entertain jurisdiction. By the general jurisdiction of courts of equity

a bill will not lie to set aside a will or its probate independently of statutes enacted conferring such jurisdiction. The power to entertain a bill for that purpose is derived exclusively from the statute, and the jurisdiction can be exercised only in the manner and under the limitations prescribed by the statute. The time within which such bill may be filed, under the statute, by any person interested is not a limitation law. (*Luther v. Luther*, 122 Ill. 558; *Wheeler v. Wheeler*, 134 id. 522; *Jele v. Lemberger*, 163 id. 338.) The statute in force at the time of the filing of the bill is the statute which confers jurisdiction on the court to entertain a bill to contest the validity of the will, and must govern."

It is contended by the appellant, if it be held that the amendment of 1903 applies to this case then she will be deprived entirely of the right to file a bill to contest said will. If this contention be conceded to be correct that would be no reason why the amendment of 1903 should not apply to a bill to contest a will filed after the passage of said amendment. The appellant had no vested right in the statute of 1895, and the legislature could have, had it seen fit, entirely abrogated said proviso and thereby swept away the entire remedy provided for by said proviso. (*Dobbins v. First Nat. Bank*, 112 Ill. 553; *People v. Binns*, 192 id. 68.) In the *Binns* case, on page 71, it was said: "There is no vested right in a public law which is not in the nature of a private grant. 'However beneficial an act of the legislature may happen to be to a particular person or however injuriously its repeal may affect him, the legislature would clearly have the right to abrogate it.'—*Dobbins v. First Nat. Bank*, 112 Ill. 553."

It is also contended that the amendment of 1903 should be given a prospective and not a retroactive application. In *Spaulding v. White*, *supra*, and *Storrs v. St. Luke's Hospital*, *supra*, the act of 1895 was given a retroactive operation,—that is, it was held to apply to all bills filed to contest wills, or the probate thereof, after its passage, although the

wills sought to be contested were admitted to probate prior to its passage. The terms of the act of 1903 are identical with the act of 1895, except the time in which the bill may be filed is fixed by the act of 1903 at one instead of two years, as it was by the act of 1895. To hold the act of 1903 should be given a prospective application only, would be to overrule those cases, which we are not disposed to do.

The appellant had from February 24, 1902, to July 1, 1903, in which to file her bill, and from April 11, 1903, to July 1, 1903, after the amendment of 1903 had been passed by the legislature and before it went into effect. As she had no vested right in the two years provided for by the act of 1895, and was bound to take notice that the legislature at any time had the right to change the time provided for by the act of 1895 in which a bill might be filed or to entirely abrogate such right, there is no force in the contention that the amendment of 1903 should be held void as being unreasonable. Neither is a different rule of practice laid down by the legislature to be applied to the appellant from that which must be applied by the courts to all persons similarly situated to her, who may desire to file a bill to contest a will, and the probate thereof, subsequent to the passage of the amendment of 1903.

We are of the opinion the act of 1903, which was in force at the time the bill was filed, is the statute that fixes the time, after the probate of the will, within which the complainant's bill was required to be filed, and that the circuit court did not err in sustaining a demurrer to said bill.

The decree of the circuit court will be affirmed.

Decree affirmed.

CHARLES A. PALTZER

v.

MARTHA J. JOHNSTON, EXTX.

Opinion filed December 22, 1904.

PRACTICE—*right of party to dismiss bill before decree.* A direction by the chancellor to "let a decree be prepared dismissing the cross-bill for want of equity," does not deprive the cross-complainant of the right to have the cross-bill dismissed without prejudice before the decree is filed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. AXEL CHYTRAUS, Judge, presiding.

WILLIS SMITH, and HENRY L. WALLACE, (JAMES E. MUNROE, of counsel,) for appellant.

MASTERSON & HAFT, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

On the 17th day of March, 1898, the Illinois Trust and Savings Bank filed in the superior court of Cook county a bill to foreclose a trust deed, and in April of the same year one James Johnston, testator of appellee, filed a cross-bill to foreclose a second trust deed on the same real estate, which latter trust deed, and the note secured thereby, were signed by one Alexander McIntosh and Charles A. Paltzer, the appellant herein. Such proceedings were had under the original bill filed by the Illinois Trust and Savings Bank that a sale of the real estate was made, but the proceeds of the sale were not sufficient to pay the amount due under the first trust deed and a deficiency decree was entered therein. Said James Johnston having departed this life, the appellee ex-

executrix was substituted as party to the proceedings, and she, by leave of the court, filed an amended and supplemental cross-bill. Answers were filed thereto by said McIntosh and the appellant, and replications to the answers. Proofs were heard in the cause on behalf of the respective parties, and on the 30th day of January, 1903, the cause was submitted to the chancellor. On that day the chancellor proceeded, orally, to declare his findings from the evidence submitted, and concluded the oral deliverance by saying, "Let a decree be prepared dismissing the cross-bill for want of equity." No minute or memorandum was made by the chancellor or by the clerk of the court showing what the direction of the chancellor was, and no decree was prepared or entered in accordance with such oral direction of the chancellor. On February 3, 1903, being one of the days of the February term of said court, the cross-complainant moved the court to dismiss her amended and supplemental bill without prejudice. The hearing of said motion was continued to the fourth day of February and again continued to the fifth day of said month, on which day appellant presented a cross-motion, whereby he asked the court "to enter of record *nunc pro tunc* as of the 30th day of January, A. D. 1903, a final decree in this cause finding that the equities of this cause are with the defendants, and ordering that the amended and supplemental cross-bill of Martha J. Johnston, executrix of the last will and testament of James Johnston, deceased, be dismissed for want of equity, in accordance with the decision and findings of the court rendered and given on said 30th day of January, A. D. 1903, after hearing all the evidence offered by the parties, and in accordance with the order of the court on said last mentioned date to 'let a decree be prepared dismissing the cross-bill for want of equity.'" The chancellor, after having heard the arguments of counsel for the respective parties, granted the motion of the cross-complainant (appellee herein) and denied the cross-motion of the appellant, and thereupon entered a decree dismissing the cross-

bill of appellee without prejudice and at her cost. Upon an appeal to the Appellate Court for the First District the decree was affirmed, and this further appeal of the appellant brings the record before this court for review.

But a single question is presented, viz., whether the chancellor erred in denying the motion of appellant for the entry of a decree *nunc pro tunc* in accordance with the oral findings and directions for a decree and in granting the motion of the cross-complainant to dismiss her cross-bill.

Under the repeated decisions of this court we must hold the action of the chancellor was free from error. In *Hughes v. Washington*, 65 Ill. 245, this court said (p. 248): "It is contended that inasmuch as the chancellor had heard the evidence and had announced what his decision would be, and had written out a statement of the grounds for the decision, it must be considered that the case was finally decided, and nothing remained but the formal matter of drawing and passing the decree. This is manifestly not the correct view of the question. * * * The decree is inchoate until it is approved by the chancellor and filed for record. * * * The mere oral announcement of the chancellor of his decision and the grounds upon which it is based, or the reducing them to writing, is no more than the minutes taken in the English practice. The whole matter is completely under the control of the chancellor until the final decree has been filed or recorded." The same doctrine is announced in *Purdy v. Henslee*, 97 Ill. 389, in which case the chancellor orally announced his conclusions after hearing the proofs of the parties, but before the final decree was entered the complainants asked leave to dismiss their bill, which was granted and the bill dismissed. It was there expressly held that the complainants had the legal right, under such circumstances, to dismiss their bill. This doctrine is also recognized in *Blair v. Reading*, 99 Ill. 600, *Gage v. Bailey*, 119 id. 539, and *Reilly v. Reilly*, 139 id. 180, it being said in the latter case (p. 184): "It would therefore seem that, in this State at

least, the rule is well settled that where no cross-bill has been filed the complainant has the right, at any time before final decree, to dismiss his bill on payment of costs."

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

THE SPRING VALLEY COAL COMPANY

v.

SIMON BUZIS.

Opinion filed December 22, 1904—Rehearing denied Feb. 8, 1905.

1. MASTER AND SERVANT—*what tends to show negligence on the part of hoisting engineer at mine.* It is the duty of a hoisting engineer at a mine to use reasonable care to control the movement of the cages in the shaft, and proof that he put a cage in such rapid motion that it struck the bottom of the shaft with great violence tends to show negligence by engineer in operating the machinery.

2. SAME—*when court cannot say that release by a servant bars action.* The trial court cannot declare, as a matter of law, that a release of damages by an injured servant operates as a bar to his action for damages, where there is evidence that his signature was obtained through fraud and circumvention.

3. RELEASE—*release of damages obtained by fraud is void.* A release of damages obtained from an injured servant by the fraud of an interpreter, who represented it to be a receipt for money advanced by the master for doctor's bills, is void if the interpreter is the representative of the master; and the consideration need not be returned nor the release canceled in equity before an action at law for damages can be maintained.

4. APPEALS AND ERRORS—*when alleged error is waived.* Alleged error of the trial court in refusing certain of defendant's instructions is waived in a court of review where his brief does not disclose the ground of objection to the trial court's action nor discuss the instructions.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JONAS HUTCHINSON, Judge, presiding.

A. R. GREENWOOD, and HENRY S. ROBBINS, for plaintiff in error.

DANIEL BELASCO, and COLLINS & ABRAHAM, for defendant in error.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The plaintiff in error company in July, 1901, owned and operated a coal mine at Spring Valley. The defendant in error was then in the employ of the company in the capacity of a miner. The vein of coal that was being mined was about five hundred feet below the surface of the ground, and the plaintiff in error maintained and by means of a steam engine operated two elevators or cages which it used for the purpose of lowering its workmen into and hoisting them out of its mine, and also for the purpose of hoisting coal. The opening of the shaft was enclosed within a building known as the "tower." This tower was of the height of seventy-five feet, and it enclosed the engine room. The engineer controlled the movements of the cages from his station in the engine room, which was about fifty feet from the mouth of the shaft. He could not see the elevators or cages from his place in the engine room, but set his engine in motion to lower or raise the cages on signals made by a workman of the plaintiff in error company known as the "top cager," who was employed for that purpose and was stationed at the top or mouth of the shaft. On the 8th day of July, 1901, the defendant in error and ten other miners in the employ of the plaintiff in error company entered one of the elevators or cages to be conveyed down the shaft to the bottom of the mine. At a signal given by the top cager the engineer put the machinery in motion to lower the cage, and the cage was let down with such rapidity that it struck the bottom of the shaft with great force and violence, and seriously injured the defendant in error and also other of the workmen. The defendant in error, in an action on the case

instituted in the superior court of Cook county, was awarded judgment in the sum of \$2500, and the Appellate Court for the First District affirmed the judgment on an appeal prosecuted by the company. This writ of error asks the reversal of these judgments.

It is first complained that the court erred in overruling the motion, entered by the plaintiff in error company, to direct a peremptory verdict in its favor. Two reasons are advanced in support of this position: First, that there was no evidence tending to show that the injury received by the defendant in error was the result of any negligence on the part of the plaintiff in error company; and second, that the defendant in error, for a valuable consideration, executed, under his hand and seal, and delivered to the plaintiff in error, a release of any and all claim for damages because of or arising from the injuries received by him.

It was the duty of the engineer to exercise reasonable care to control the downward motion of the cage, to the end that it should convey the persons riding therein to the bottom of the shaft without injury. The evidence tended to show that he put the cage in rapid and dangerous motion, and that it moved with such speed as to strike the bottom of the shaft with great force and violence. The mere fact that an employee has been injured is not sufficient to establish that an employer was guilty of negligence and may have no tendency to show that the injury was the result of negligence on the part of the employer, but the manner of and circumstances under which an injury was received may furnish proof of such negligence. The fact, in the case at bar, that the cage was allowed to descend with such great rapidity and force, tended to show negligence on the part of the engineer in handling and operating the machinery.

The court could not declare, as a matter of law, that the release operated as a bar to the right of the defendant in error to recover, for the reason there was evidence tending to show that the signature of the defendant in error thereto

was obtained through fraud and circumvention. It was proven that the defendant in error was unable to read or clearly understand the English language. His tongue was Lithuanian, but he could speak a few words in English. In the interview which resulted in the execution of the paper purporting to be a release, one Mr. Novak acted as interpreter. He died prior to the hearing. The purported release was dated July 17, 1901,—about nine days after defendant in error received his injuries. He was then confined to his bed. The defendant in error, as interpreted, testified: "I remember when I made my mark on this paper (referring to the paper handed witness.) It was three or four days after I was hurt. There were present a clerk, interpreter and somebody else. They said that they would give \$35 to pay the doctor's bill. They said when they gave money you must give a receipt for the money. The man that gave the money spoke to me, but I said that I can't write. He says, 'It is nothing.' I talked in the Lithuanian language. They said they would give money for medicine. He was talking to me. He told me, 'We will give you money for medicine.' I gave a receipt for the \$30. Nothing else was said to me about this paper.

Q. "Did Mr. Novak tell you what is on that paper, and then you tell him what is on that paper? (The interpreter here translated said document to the witness.)

A. "No, he didn't say that. Mr. Novak said that you must give a receipt for the money."

Charles Buzis, a son of the defendant in error, testified, in substance, that he was present when the paper was signed, and that he speaks both English and Lithuanian, and that Mr. Novak spoke to his father in the Lithuanian language. He further testified: "The first thing Novak said to my father when he came in was, 'How are you making out?' and my father said he is awful sick now; he got his leg broke. Mr. Novak then said, 'We came over here to see you; we came over to settle the case,' and my father said

he won't settle the case until he gets better. Novak then told my father they would try to help him along and give him \$30 or \$35 doctor's bills, for to help him along until he gets better, and my father said all right. After that they took out a receipt. I don't know now which one of the fellows took it out. The man that did it was the highest clerk, I think, of the Spring Valley Coal Company. He took it out of his pocket and told my father to sign down his name, and he said he didn't know how to write, and he told him to put a cross on the receipt, and so he did. Mr. Novak told my father what he put his mark on the paper for. He said, "That is for the \$30,—for the \$35." He didn't read the paper to my father or tell him that this receipt released the company from all claims and demands for his injuries. Mr. Novak did not repeat to my father in the Lithuanian language what you have just read to me, being the contents of that release. He said that was the receipt for the \$30. That is all I know that he told my father."

Plaintiff in error insists that there was no proof that the representatives of the company made any misrepresentations whatever to Mr. Novak to be translated to the defendant in error, and could not understand the language in which Novak spoke to the defendant in error, and if Mr. Novak deceived the defendant in error with reference to the character of the instrument to which the defendant in error made his mark, it was the deceit and fraud of the interpreter, and that the interpreter was acting as the agent of the defendant in error. There was a conflict in the testimony as to the party for whom Mr. Novak was acting. The son of the defendant in error testified that Novak said to his father: "We (clearly meaning himself and the representatives of the plaintiff in error company who were then present,) came over to see you; we came over to settle the case," and that his father said "he would not settle the case until he got better," and that Novak said "they would try to help him along until he got better, and would give him \$30 or \$35 for that purpose,"

etc. We find nothing in the record to show that Novak was present at the request or instance of the defendant in error, and the statement made by Novak, as testified to by Charles Buzis, tended to show that Novak came there with and was acting in conjunction with the representative of plaintiff in error. There was therefore evidence tending to show that defendant in error was deceived into signing the release by the belief that the paper he was signing was a receipt for money advanced by the company to enable him to pay for medicine and the services of a physician, and that he did not intend to execute a release of damages or understand that he was signing a release. It is competent to show, in an action at law, that the execution of a release was obtained by fraud and circumvention. It was a question of fact to be determined by the jury whether the execution of the release was obtained by fraud and circumvention. The instrument was void if so obtained, and it was not necessary to return the consideration or to remove the instrument by a decree in chancery out of the way of the maintenance of the action at law. *Papke v. Hammond Co.* 192 Ill. 631; *Indiana, Decatur and Western Railroad Co. v. Fowler*, 201 id. 152.

The court did not err in overruling the motion for a peremptory verdict.

It is assigned as for error that the court refused the first and fourth instructions asked in behalf of the plaintiff in error, but the brief of counsel does not disclose the ground of objection to such action of the court or discuss either of the instructions. The point is therefore waived.

The judgment must be and is affirmed.

Judgment affirmed.

HENRY H. GAGE *et al.*

v.

THE PEOPLE *ex rel.* John J. Hanberg, County Treasurer.*Opinion filed December 22, 1904—Rehearing denied Feb. 9, 1905.*

1. SPECIAL ASSESSMENTS—*what not sufficient proof of non-compliance with section 75.* Non-compliance with section 75 of the Local Improvement act as amended in 1901, requiring steps for letting the contract to be taken within fifteen days from final determination of an appeal or writ of error, is not established by proof that the confirmation judgment was affirmed by the Supreme Court in February and an order for an advertisement for bids was entered the following July.

2. SAME—*a judgment for special assessment must be certain in amount.* A judgment for a delinquent special assessment is fatally defective which fails to show, in terms or by reference, the amount, in dollars and cents, due for the assessment and costs.

3. SAME—*what does not show amount of judgment.* Numerals placed in a column of the schedule attached to the order of sale, headed "total," do not show the amount of the judgment where there is no dollar-mark or character, either at the head of the column or elsewhere, to show what the numerals were designed to represent.

4. SAME—*when clause reciting obtaining of jurisdiction by notice is unnecessary.* The jurisdictional clause contained in the statutory form of a judgment of sale, which is a recital that the court has obtained jurisdiction by giving notice, is unnecessary, where the record shows that jurisdiction was acquired by the appearance of the parties and a hearing of the objections.

5. SAME—*what omission from the statutory form of judgment of sale is proper.* Omission of the words "or so much of each of them as shall be sufficient" from the statutory form prescribed by section 191 of the Revenue act for a judgment for a delinquent special assessment against the several lots or tracts is proper since the change made by section 202 of the Revenue act in the method of sale.

APPEAL from the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

F. W. BECKER, for appellants.

218	847
2218	457
2318	472

WILLIAM M. PINDELL, (EDGAR BRONSON TOLMAN, Corporation Counsel, and ROBERT REDFIELD, of counsel,) for appellee.

MR. JUSTICE CARTWRIGHT delivered the opinion of the court:

From a judgment and order of sale entered by the county court of Cook county against appellants' lots for a delinquent special assessment they have prosecuted this appeal.

One of the objections filed by appellants was that the contract for the work on the improvement for which the assessment was levied was not let, nor any steps taken to let the same, within the time prescribed by section 75 of the Local Improvement act as amended in 1901, and this is the only objection now insisted upon. The judgment confirming the assessment was entered in the county court on September 26, 1902, and an appeal was taken to this court. The provision of section 75 applicable to such cases is as follows: "If the judgment of condemnation or of confirmation of the special tax or special assessment levied for such work be appealed from, or stayed by a *supersedeas* or other order of a court having jurisdiction, * * * then the steps herein provided for the letting of the contract for such work shall be taken within fifteen (15) days after the final determination of said appeal or writ of error, or the determination of such stay, unless the proceeding be abandoned as herein provided." (Laws of 1901, p. 113.) Appellants assumed the burden of proving the fact alleged in the objection, that no steps were taken to let the contract within the time prescribed by the statute, and the only evidence on that subject was that the judgment confirming the assessment was affirmed by this court on February 18, 1903, and that an order for an advertisement for bids was entered by the board of local improvements on July 30, 1903. There was no evidence that no previous step had been taken by the board of local improve-

ments toward letting the contract, nor that there had been no stay of proceedings after February 18, 1903, by an order of a court having jurisdiction. In fact, counsel for appellants says in his brief, although we have not found it in the abstract, that there was a petition to this court for a rehearing, which was denied on June 11, 1903. Our rules provide for an order staying proceedings on the filing of such petition in a proper case, and there was no evidence whether such an order was granted nor of the final determination of any stay. The statute extends the time fifteen days beyond the final determination of an appeal or the determination of a stay by a *supersedeas* or other order of a court having jurisdiction. If the fact alleged had been proved, questions whether the statute is mandatory or directory and whether a property owner who stands by while a beneficial improvement is being made is estopped from objecting as to a matter which perhaps has not been in any manner detrimental to him would have arisen, but we do not regard the fact as proved. The court did not err in overruling the objection.

Errors are assigned as to the form and sufficiency of the judgment and order of sale. One of them is, that the judgment is defective in failing to state the amount for which it was rendered. A judgment for a tax or special assessment must be certain in amount. (*Gage v. People*, 207 Ill. 61.) If it does not, in terms or by reference, find the sums of money due for the tax or assessment and costs it is fatally defective. (*Pittsburgh, Ft. Wayne and Chicago Railway Co. v. City of Chicago*, 53 Ill. 80.) The form of judgment given in section 191 of the Revenue act is adapted to a judgment following the delinquent list and found in the judgment, sale and redemption record, to which the word "aforesaid" refers. In this case judgment was entered against the tracts or lots of land set forth in a schedule attached to the order, which would be sufficient if the schedule showed the property and the several amounts due for the special assessment and costs. But it does not. At the head of one column is the word

"lots," at the head of another "blk.," and at the head of the next is "total." In the columns there are numbers of the lots with numerals opposite them in the last column, but there is no word, mark or character to show what the numerals are designed for, either at the head of the column or elsewhere. There is no reference in the judgment to the delinquent list, or to anything in the record from which it can be said that the numerals stand for dollars and cents. The judgment does not, either in terms or by reference, find or state the several amounts for which it was rendered, and it is for that reason defective.

It is also insisted that the judgment is erroneous in omitting the jurisdictional clause contained in the statutory form of judgment. That clause is a recital that the court has obtained jurisdiction by the giving of notice of the intended application. The statute requires the order to be substantially in the form there given, and it is essential that the record should show jurisdiction, but it is manifest that the jurisdictional clause must be varied to suit the conditions of the case. In this judgment the jurisdiction is shown by a recital of the appearance of the parties and a hearing of the objections. It is only necessary or proper to recite the obtaining of jurisdiction by a notice when jurisdiction is acquired in that way.

It is further urged that the judgment is defective in ordering a sale of the several tracts or lots without the words "or so much of each of them as shall be sufficient," contained in the statutory form. The judgment orders the several tracts or lots to be sold as the law directs to satisfy the assessment and costs. The method of sale has been changed by section 202 of the Revenue act, which provides that the person offering to pay the amount due on each tract or lot for the least percentage thereon for penalty shall be the purchaser thereof. (Hurd's Stat. 1899, p. 1428.) The provision now is that the whole lot shall be sold to the one offering to buy for the least percentage as penalty, and the former provision being inapplicable, the order was properly modified accordingly. The

omission of the words which are in conflict with the present statute was proper.

The only error committed by the county court was in the entry of the judgment, and for that error the judgment is reversed and the cause is remanded to the county court, with directions to enter a proper judgment showing the several amounts for which it is rendered against the several lots.

Reversed and remanded.

E. J. MAGERSTADT *et al.*

v.

LOTTIE E. SCHAEFER.

Opinion filed December 22, 1904—Rehearing denied Feb. 8, 1905.

1. **EXECUTIONS**—*extent to which shares of stock are subject to levy.* The statute which makes shares of stock subject to levy under an execution issued on a judgment against the stockholder does not authorize the levy of the execution on shares of stock not owned by the judgment debtor, although standing in his name on the books of the corporation.

2. **SAME**—*when a wife may assert title to stock as against husband's creditors.* A wife may assert title to shares of stock actually owned by her although issued in the name of her husband and standing in his name on the company's books, even as against the husband's creditors, where there is nothing in her conduct or that of her husband, in dealing with the stock, that has misled the creditors to their injury.

3. **SAME**—*when creditors are not misled by the wife's conduct.* Judgment creditors cannot be said to have been misled to their prejudice by the conduct of the judgment debtor's wife, in permitting shares of stock which she purchased with her own money to be issued and allowed to remain in her husband's name, where the judgments were entered long prior to organization of the corporation, or indebtedness unconnected with the corporation or shares of stock.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JESSE HOLDOM, Judge, presiding.

F. P. READ, (E. ALLEN FROST, of counsel,) for appellants.

ROGERS & MAHONEY, and CHILTON P. WILSON, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

In 1895 and 1896 four judgments, aggregating about \$1900, were rendered in Cook county in favor of Owen F. Aldis and others against Andrew McAnsh and P. F. Schaefer. In October, 1901, these judgments were assigned to one of the appellants, William B. Hiller, and executions immediately issued thereon and were levied by the sheriff of Cook county on forty shares of stock in the North Shore Advertising Company and a like number of shares in the Joliet Bill Posting Company, corporations organized under the State of Illinois, all of which stock stood upon the books of said corporations in the name of P. F. Schaefer. On January 9, 1902, the appellee, his wife, filed two bills in chancery in the superior court of Cook county, one against the Joliet Bill Posting Company, Ernest J. Magerstadt, sheriff of Cook county, and William B. Hiller, and the other against the North Shore Advertising Company and said Magerstadt and Hiller. In each of these bills she alleged that she was the owner of said forty shares of stock of each of the corporations; that certificates therefor were issued to her husband, P. F. Schaefer, but that he never paid for or owned the stock, nor had any interest therein except as her agent and trustee; that when the same was issued, the latter part of 1900, when the company was organized, her husband immediately assigned and delivered the stock in the Joliet Bill Posting Company to her; that the stock in the North Shore Advertising Company, immediately after it was issued, was hypothecated to one Burr Robbins as collateral security for a \$6000 note of her husband, being a part of the consideration paid for said stock, which note was paid by her on February 7,

1902, and said stock then delivered to her; that she neglected to have said stock transferred on the corporation's books and new certificates issued to her until November 21, 1901, when she demanded that this be done, but that they had each refused to comply with her request. She prayed for an order directing such transfer and registry, and that an injunction be issued restraining the defendants Magerstadt, as sheriff, and Hiller, as such judgment creditor, from in any way selling or interfering with the said shares of stock. A preliminary injunction was issued and the two cases consolidated. Upon final hearing, on answers denying the allegations of the bills and replications thereto, which hearing was before the chancellor in open court, a decree was rendered finding that the shares of stock in each company had always been and were then the individual property of the complainant, and the corporations were ordered to transfer the same to her within three days, and the lien created by the levy of said executions ordered removed and declared null and void, and the sheriff enjoined from enforcing his levy or selling the same. From that decree an appeal was taken to the Appellate Court for the First District, where it was affirmed, hence this appeal.

The evidence shows that P. F. Schaefer, Burr Robbins and R. C. Campbell, on December 21, 1900, organized the Joliet Bill Posting Company and the North Shore Advertising Company, corporations, for the purpose of carrying on the business of general advertising in Joliet and Waukegan. Each corporation had a capital stock of \$6000, divided into one hundred and twenty shares of \$50. The incorporators each subscribed and paid for forty shares, or one-third of the capital stock in said companies, and certificates for the shares in each company were issued to P. F. Schaefer and receipted for on the corporation books by him the latter part of January, 1901. Appellee and her husband testified, upon the hearing, that in the transaction the husband acted as her agent and trustee and paid for the stock with her money, and

they explained the source from which she derived the money, the original funds being received from her father's estate, \$10,000 when she was married and \$9000 at the time of the world's fair. Dividends were declared upon the stock from time to time and paid to the husband, the money being deposited to his credit in bank. He had been an officer and director in each of the corporations, and attended all stockholders' meetings and voted and represented said shares of stock as though they were his own. They both testify positively that in all his transactions concerning the issuing and managing of the stock he acted for her as her agent.

The principal ground of reversal insisted upon is, that the title to the shares of stock in a corporation, as to third parties, can only be shown by the stock books of the corporation, and that the mere delivery of certificates of stock without a transfer upon the stock books passes no title. In other words, the contention is that the books of a corporation showing who the stockholders are is conclusive evidence of the title or ownership of the shares of stock when attempted to be seized by an execution creditor of the one in whose name the stock is registered. In support of this contention reliance is placed upon sections 52 to 56 of chapter 77 of our statutes of 1874, relating to the levying and sale of stock of corporations, as construed by this court in the case of *People's Bank v. Gridley*, 91 Ill. 457. The language of section 52 of the statute at the time that case was decided provided that "the shares or interest of a stockholder in any corporation may be taken on execution and sold as hereinafter provided." By an amendment passed in 1883 there was added to that language the following: "But in all cases where such shares or interest has been sold or pledged in good faith for a valuable consideration and the certificate thereof has been delivered upon said sale or pledge, such share or interest shall not be liable to be taken on execution against the vendor or pledgor except for the excess of the value thereof over and above the sum for which the same

may have been pledged and the certificate thereof delivered." In construing this amendment we held in *Rice v. Gilbert*, 173 Ill. 348, that a pledge or sale of stock made by a stockholder in good faith for a valuable consideration was valid, as against creditors of such stockholder, without the transfer being registered upon the company's books. It may be admitted, as contended by counsel for appellants, that in the present case the stock levied upon was not, strictly speaking, sold or pledged. The certificates were, however, delivered to the wife in consideration of her having paid for the same, and in that sense we think there was a sale, within the meaning of the amendment of 1883. That statute was evidently intended to protect the equitable rights of persons interested in the stock of corporations as it had been construed in the *Gridley case*. But in that case there was no question but that the pledgor was the legal owner of the stock, and the point decided was, that in view of the charter of the company, which expressly provided that the transfer of stock should only be made upon the books of the secretary on the presentation of the stock certificates properly endorsed, an attempted transfer in any other manner was ineffectual to pass the title. It did not hold that the real owner of the stock could not in any case be shown, notwithstanding the registration thereof upon the company's books in the name of another.

In our opinion, however, this case may be decided without reference to what was held in either of the foregoing decisions. At common law, shares of stock could not be taken upon execution, being in the nature of choses in action. Our statute makes such shares or interest of a stockholder in a corporation liable to levy and sale upon a judgment and execution. It does not, however, authorize the levy of such execution upon stock which is not owned by the judgment debtor though standing in his name on the company's books. Here, according to the finding of the chancellor, which is sustained by the evidence, the defendant in the execution,

P. F. Schaefer, never was the actual owner of the shares of stock levied upon. They belonged to his wife and were paid for with her money. All that can be said is, that they were issued in the name of the husband, delivered to him and so registered upon the company's books, and that the wife permitted this to be done, allowing him to deal with the stock as his own, and therefore it is said she ought not, in equity, to be allowed to assert her ownership against the execution creditor. The statute having made the shares of stock liable to execution, they stand in the same position as any other goods and chattels liable to be seized and sold in satisfaction of a judgment. Notwithstanding the ownership of the wife as her separate property, she might permit her husband to so deal with it as to make it liable for his debts; but in the absence of anything tending to show that by her conduct and that of her husband in dealing with the property his creditors have been misled to their injury, there is no reason why she may not assert her title to the same extent as if the shares of stock had been any other class of personal property. We have frequently held that under our Married Woman's act a wife may own property and allow her husband to act as her agent in transacting business growing out of such property, such as procuring and transferring the same, without subjecting it to the payment of his debts. As was said in *Tomlinson v. Matthews*, 98 Ill. 178: "As to the property of the wife, protected as her separate property by the statutes in force in reference thereto, the husband occupies the same relation as does a stranger. She may sell it or loan it to him, or constitute him her agent for its management and disposition; but a gift of it by her to him will not be presumed in the absence of proof to that effect." See, also, *Dean v. Bailey*, 50 Ill. 481, *Bongard v. Core*, 82 id. 19, *Primmer v. Clabaugh*, 78 id. 94, and *Alsdurf v. Williams*, 196 id. 244.

Under the undisputed evidence in this case there can be no serious question but that, as between the complainant in

the bill below and her husband, she was entitled to the property and could have recovered the same in an action against him. It is true that by the manner in which she allowed her husband to deal with it she assumed the burden of showing that such conduct resulted in no fraud or injury upon her husband's creditors, and that she had no fraudulent purpose or design in permitting the stock to be issued to and stand in his name. From the record in this case no conceivable injury could have resulted to the plaintiff in the execution by reason of the complainant's conduct or the manner of dealing with the stock by her husband. The judgments upon which the executions were issued were rendered long before the organization of either of the corporations, and hence prior to the issuing of the stock to the husband, and therefore it could not be claimed that the judgment creditors were induced to give credit to him because of the fact that the stock stood upon the company's books in his name. Those judgments were also obtained on account of an indebtedness in no way connected with the corporations or shares of stock.

The question as to the ownership of the property, the manner in which it was dealt with and whether or not the complainant below was guilty of any fraudulent conduct or improper motive in allowing her husband to deal with it as his own so as to hinder or delay his creditors, were all questions of fact submitted to the chancellor, who saw the witnesses and heard them testify, and we think his finding and decree in favor of the complainant were fully authorized by the testimony.

We think all other questions raised upon this appeal have been properly disposed of by the Appellate Court. Its judgment will accordingly be affirmed.

Judgment affirmed.

MORGAN & WRIGHT
v.
ELTON W. McCASLIN.

Opinion filed December 22, 1904—Rehearing denied Feb. 8, 1905.

APPEALS AND ERRORS—*when grounds urged for reversal present no question of law.* On appeal from an affirmance by the Appellate Court of a judgment in assumpsit, objections that the verdict is not sustained by the evidence, that the grounds urged in support of the judgment are inconsistent with appellee's theory in the trial court, and that there was no evidence of a contract for any definite period, present no question of law for the Supreme Court, where no instruction to take the case from the jury was asked, the submission to the jury being on instructions given for both parties.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. PHILIP STEIN, Judge, presiding.

JOHN C. FARWELL, and GERALD G. BARRY, for appellant.

COLSON & JOHNSON, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

On April 2, 1902, appellee brought a suit in assumpsit against appellant in the superior court of Cook county to recover damages for the breach of a contract of employment, and also to recover a balance claimed to be due him for services rendered.

The declaration contained two special counts and the common counts. The first count alleges that in January, 1900, the defendant, being engaged in the manufacture of rubber goods, employed the plaintiff as superintendent of its factory at a salary of \$5000 per year, which was duly paid for that year; that he continued in the same employment at the same salary for the following year, but received therefor only the sum of \$3500. The second count alleges that he continued in the employment of defendant at the same salary

for the year 1902, but on January 18 of the year was discharged for the remainder of the year without cause and in violation of the contract. His demand is for \$1500 balance of salary for the year 1901, together with \$75 interest thereon, and also a balance of \$4541.68, balance of salary for the year 1902, which he alleges he was unjustly deprived of, making a total of \$6041.69. The plea was the general issue. Upon the trial before a jury judgment was rendered in favor of the plaintiff for \$3013, which, on appeal to the Appellate Court for the First District, has been affirmed. This appeal is from the judgment of affirmance.

The jury found specially that the plaintiff and defendant made a contract in 1900 concerning the employment of the plaintiff for that year; that the evidence showed that the plaintiff held his services subject to the order of defendant from the time of his discharge by defendant until August 9, 1902; that it found from the evidence, under the instructions, a contract of employment between the parties covering the year 1902; that plaintiff, after his discharge, held himself in readiness to render services to the defendant during the year 1902, and was holding his services on August 9, 1902, subject to the orders of the defendant; that he could not by reasonable diligence have obtained other employment similar to that which he had with the defendant during the year 1901, between the time of his discharge and the time he actually entered the employment of other parties.

The grounds of reversal here urged are stated by counsel for appellant as follows: "(1) That the verdict is not supported by the evidence and is illogical; (2) the grounds urged in support of this verdict and judgment are inconsistent with the theory of the appellee on the trial in the court below; (3) there is no evidence tending to establish a contract of hiring for a year or for any definite period, and hence no evidence tending to establish a cause of action."

There was no instruction asked by the defendant to withdraw the case from the jury at the close of the evidence or at

any time, but it was submitted to the jury on instructions given both on behalf of plaintiff and defendant. Manifestly the grounds of reversal now urged raise no question of law, and by the express provisions of the statute cannot be assigned for error in this court in this class of cases. (Hurd's Stat. 1903, chap. 110, sec. 89, p. 1413.)

No objection is urged against the ruling of the trial court, either as to the admission or exclusion of evidence or the giving or refusing of instructions. We are not called upon in this state of the record, nor are we permitted by the statute, to follow counsel in their discussion of the case on the facts.

The judgment of the Appellate Court will accordingly be affirmed.

Judgment affirmed.

FREDERICK A. WINKELMAN

v.

THE CITY OF CHICAGO.

Opinion filed December 22, 1904—Rehearing denied Feb. 9, 1905.

1. APPEALS AND ERRORS—*when construction of the constitution is involved.* Whether or not the alleged wrongful delay of a city in bringing a condemnation suit to trial and in electing to abandon the proceeding after judgment and after defendants have incurred expense in carrying on the litigation, constitutes a damage to private property for public use for which compensation is recoverable involves the construction of the constitution, and an appeal lies directly to the Supreme Court.

2. EMINENT DOMAIN—*a city is liable for damage from wrongful delay in condemnation.* The wrongful delay by a city in bringing a condemnation suit to trial and in electing to abandon the suit after judgment, which prevented the sale of the land by the owner before the property had decreased in value, is a damage to private property for public use within the meaning of the statute, for which the city is liable to the owner.

3. SAME—*owner of land at time of wrongful delay may recover damages.* The person owning land at the time when the wrongful

delay by a city in bringing a condemnation suit to trial and in making its election to abandon the proceeding occurred is the party entitled to recover damages sustained through such wrongful delay.

4. *SAME—when defendant cannot recover expense of defending an abandoned condemnation suit.* The expense of defending a condemnation suit abandoned after judgment cannot be recovered by the defendant as damages, where the suit was abandoned by the petitioner prior to the act of July 1, 1897, authorizing the allowance of costs, expenses and attorneys' fees in such event.

5. *PRACTICE—preparation of trial calendar must be under control of court.* It is improper practice to allow counsel for the city to make up the trial calendar of the city's condemnation cases to suit his own convenience.

6. *ESTOPPEL—when city is estopped to claim that party should have applied to court for speedy trial.* Where counsel for the city is given and assumes the right to make up and control the trial calendar of condemnation suits, the city is estopped, in a suit for damages for wrongful delay in bringing a condemnation suit to trial, to urge that the defendant should have applied to the court to have his case set for trial instead of to the corporation counsel.

WRIT OF ERROR to the Superior Court of Cook county;
the Hon. M. KAVANAGH, Judge, presiding.

SAMUEL B. KING, for plaintiff in error.

WILLIAM D. BARGE, (EDGAR BRONSON TOLMAN, Corporation Counsel, of counsel,) for defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

This writ of error is sued out from this court directly to the superior court of Cook county. A preliminary question is presented by a motion to dismiss the writ on the ground that this court is without jurisdiction to entertain it. Plaintiff in error sought to recover damages occasioned by the fact that the city of Chicago failed and refused to bring to trial a condemnation proceeding, instituted by it in the circuit court of Cook county to condemn a strip of land off of a parcel of real estate now the property of plaintiff in error, for a period of more than five years after the beginning of the

proceeding, and by the fact that the city abandoned the proceeding but did not elect to do so for a period of more than fifteen months after the judgment fixing the amount of damages was entered; and also sought to recover money expended in the employment of counsel and for other expenses in carrying on the litigation.

Section 13 of article 2, constitution of 1870, provides: "Private property shall not be taken or damaged for public use without just compensation."

Plaintiff in error contends that the acts complained of amount to a taking or damaging of his property for public use, within the meaning of this provision of the constitution. It is apparent that the cause involves a construction of the constitution, and that the writ was properly sued out of this court in the first instance. The motion to dismiss will be denied.

The proceeding was instituted on July 8, 1890. The cause was tried in November, 1895. The judgment of condemnation was entered on January 31, 1896, and on May 17, 1897, the city council passed an ordinance directing the corporation counsel to have the judgment vacated and the petition dismissed. Plaintiff in error introduced evidence showing that he acquired title to the property within a few days after the condemnation proceeding was instituted, and became a party defendant to the condemnation suit, by appearing therein, two days before the trial of the cause, in November, 1895; that between the time he acquired title and the time the proceeding was abandoned there was a material decrease in the value of this property; that he sought to sell it before this decrease took place, and would have done so but for the fact that no one would buy while the suit was pending. When plaintiff in error closed his proof, this evidence, on motion of the defendant in error, was stricken out, and this action of the court is assigned for error. The amount of damages sought on account of delay is the difference between the value of the real estate at the time plaintiff in error would

have sold it but for the pendency of the suit and its value at the time the judgment was vacated and petition dismissed.

When a municipal corporation institutes a proceeding to condemn land, it should prosecute the suit with diligence. Upon the damages being fixed by the judgment, it is its duty to determine, within a reasonable time, whether it will pay the damages and enter upon the land or abandon the proceeding, and if it takes the latter course, its purpose should be promptly and unequivocally made a matter of record by the vacation of the judgment and the dismissal of the petition. If it wrongfully delays the trial of the cause, and omits to make its election to take the land or abandon the proceeding within a reasonable time after the amount of the judgment has been fixed, and then elects to discontinue, it is liable to the owner of the land for damages occasioned by such wrongful acts. If the acts be not both wrongful and injurious there is no liability; but where they are both wrongful and injurious the land owner is entitled to recover. 2 Dillon on Mun. Corp. (4th ed.) sec. 609; 7 Ency. of Pl. & Pr. p. 686; *Simpson v. Kansas City*, 111 Mo. 237; *Feiten v. City of Milwaukee*, 47 Wis. 494; *Carson v. City of Hartford*, 48 Conn. 68; *Norris v. City of Baltimore*, 44 Md. 598; *Graff v. City of Baltimore*, 10 id. 544.

The right to recover is based, not upon the fact that there is delay in the prosecution of the suit and consequent damage or that there is delay in determining to abandon the proceeding after the amount of damages is fixed and resulting damage to the land, but upon the theory that the delay in prosecuting the suit has been wrongful or that the abandonment was not determined upon within a reasonable time after the award had been fixed, and that in either case the delay occasioned damage to the land owner.

In the case at bar it appears from the evidence that the courts in Cook county permit a clerk employed in the office of the corporation counsel to make up a trial calendar for the trial of condemnation proceedings, on which he places all con-

demnation suits in which the city is petitioner and which it is prepared to try and desires to try, and thereafter, at some convenient time, cases on this calendar are taken up and disposed of by one of the judges who is assigned to try the causes on that calendar; that such suits are not placed on any other trial calendar, and are not placed on that calendar until the corporation counsel desires to have them tried, and that plaintiff in error applied to the corporation counsel at frequent intervals to have this cause placed on trial, but that his request was not complied with for a period of more than five years.

If it be true that the practice obtains in Cook county of having this calendar made up in the manner indicated above, it should be discontinued. Our statute contemplates that the preparation of trial calendars shall be under the control of the courts, and that control should not be surrendered to one of the parties to the cause. The petitioner in an eminent domain proceeding has no right whatever to determine when the cause shall be tried. That right rests exclusively with the court, or with the judge of the court if the petition is presented to him in vacation.

It is urged by the city that the plaintiff in error cannot recover because he did not apply to the court in which the cause was pending to have it placed upon the trial calendar and disposed of. Ordinarily, we think, there would be force in this objection. The defendant who stands by and makes no effort to bring his cause to trial should be considered as waiving damages caused by the delay. If he desires a speedy trial, it is his duty to advise the court of that fact. Here, however, according to the proof the corporation counsel had assumed, and the court had permitted him to assume, control of the trial calendar. He was given the right and assumed the right to say at what time the defendant's cause should be heard, and despite the repeated requests of the defendant for an early setting of the cause, refused to place it upon the trial calendar, so that it could be reached for trial, until a time

more than five years after the beginning of the suit, and until one hundred and forty cases, begun after that case was begun, had been disposed of. Under these circumstances, the city is estopped to say that plaintiff in error should have applied to the court to have his case placed upon the trial calendar, and the proof made by plaintiff in error placed upon the city the burden of showing that it had not wrongfully delayed the trial of the cause.

More than fifteen months intervened between the time the judgment was entered and the time the ordinance abandoning the proceeding was passed. Here everything necessarily awaited the action of the city. The owner of the land was entirely without any means of hastening the time when the city would elect. Such a delay is *prima facie* unreasonable. Public policy forbids that a municipal corporation should be permitted to practice such an imposition upon the property owner.

It is also urged that the damages claimed, even if recoverable, could be sued for only by the grantor of plaintiff in error who was the owner when the condemnation suit was instituted, and in support of this position the doctrine is invoked that the right of action against a corporation taking private property without making compensation therefor is vested in the person who owned the property at the time it was taken. This doctrine is not applicable because plaintiff in error does not seek to recover for the actual taking of the property. What he seeks is damages occasioned by wrongful delay. Such damages necessarily accrue to the person owning the property when such delay occurred, and are payable to the person who owned the real estate at the time of the wrongful delay. Plaintiff in error is therefore entitled to recover any damages sustained in the manner aforesaid which were visited upon the property after the delivery to him of his deed. The court erred in striking out the evidence of the plaintiff in so far as it tended to establish such damages accruing after he was vested with the title. The damages

sought to be established by the proof stricken were damages to private property, falling within the language of the constitution hereinabove quoted.

The court peremptorily instructed the jury to find the defendant below guilty and to assess the damages at \$450, which was the amount paid by plaintiff in error for attorney's fees and other expenses in defending the condemnation suit. The city questions the giving of this instruction by cross-errors assigned in this court. We find that such expenses have been allowed in other jurisdictions where statutes exist authorizing their recovery or where the right to abandon the condemnation proceeding is not an absolute right but rests in the discretion of the court. Where such discretion exists it has been held that the court may impose conditions upon the discontinuance of the proceeding, and that it is reasonable to require the petitioner, under such circumstances, to pay the attorneys' fees and other expenses incurred by the defendant in the litigation. Where the right to abandon the proceeding is an absolute right, and where there is no statute authorizing a recovery of such expenses, they cannot be recovered. In this State, the right of the petitioner to discontinue is absolute, and at the time this proceeding was abandoned, we had no statute authorizing the allowance to the defendant, in such event, of costs, expenses and attorneys' fees incurred in the defense of the petition, our statute authorizing such an allowance having become effective on July 1, 1897. It follows that the plaintiff in error is not entitled to recover his attorneys' fees and other expenses incurred in the defense of the condemnation suit, and that the court below erred in giving the peremptory instruction.

The judgment of the superior court will be reversed and the cause will be remanded to that court for further proceedings consistent with the views herein expressed.

Reversed and remanded.

THE PEOPLE *ex rel.* Walter B. Merriman, County Treasurer,
v.

THE ILLINOIS CENTRAL RAILROAD COMPANY.

Opinion filed December 22, 1904—Rehearing denied Feb. 9, 1905.

1. SPECIAL ASSESSMENTS—*confirmation judgment can be collaterally attacked only for want of jurisdiction.* A judgment confirming a special assessment can be attacked, upon an application for judgment of sale, only for want of jurisdiction apparent from the face of the record.

2. SAME—*when court has jurisdiction though the real owner received no notice.* If a special assessment notice is sent to the person shown by the collector's books to have paid the taxes upon the property during the last preceding year the county court has jurisdiction to confirm the assessment against the property, and its judgment cannot be collaterally attacked upon the ground the real owner received no notice.

APPEAL from the County Court of Lee county; the Hon. ROBERT H. SCOTT, Judge, presiding.

CHARLES H. WOOSTER, State's Attorney, HARRY EDWARDS, and JOHN S. DORNBLASER, for appellant.

WILLIAM BARGE, (J. M. DICKINSON, of counsel,) for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is an appeal from a judgment of the county court of Lee county sustaining objections to an application for judgment and order of sale for a delinquent special sewer assessment of the city of Dixon against certain lands of the appellee, described as the southerly ninety feet of the block west of the Illinois Central railroad, in said city.

The appellee acquired title to the land in 1852 and has remained the owner since that time. In 1902 the city of Dixon sought to levy a special assessment against this and other property for the construction of a sewer. A commissioner was duly appointed to spread the assessment, and he

filed his assessment roll, together with an affidavit of the posting and mailing of notices, as provided by statute. Under sections 18 and 22 of its charter appellee pays into the State treasury a certain per cent of its gross income in lieu of general taxes, and for this reason the premises in question did not appear upon the tax book in its name, but for some reason, unexplained by this record, the property did appear on the tax book in the name of O. B. Dodge, and was so assessed from 1897 to 1902, inclusive, and he, Dodge, paid the taxes assessed thereon for those years. The commissioner entered the property on the roll in the name of Dodge and mailed the notice to him. It is now contended by appellee that the assessment is illegal and void because the notice was sent to Dodge and not to the railroad company, and therefore it had no opportunity to appear in the county court and object to the assessment.

Section 41 of the Local Improvement act of 1901, (Hurd's Stat. 1903, p. 400,) after providing what the notice of the assessment shall contain, is as follows: "Such notices shall be sent by mail post-paid to each of the said persons paying the taxes on the respective parcels during the last preceding year in which taxes were paid. * * * An affidavit shall be filed before the final hearing showing a compliance with the requirements of this section, and also showing that the affiant * * * made a careful examination of the collector's books showing the payments of general taxes during the last preceding year in which the taxes were paid thereon, to ascertain the person or persons who last paid the taxes on said respective parcels, and a diligent search for their residences, and that the report correctly states the same as ascertained by the affiant; and said report and affidavit shall be conclusive evidence, for the purpose of said proceeding, of the correctness of the assessment roll in said particulars; but in case the said affidavit shall be found in any respect willfully false, the person making the same shall be deemed guilty of perjury," etc.

It appears from this clause that the commissioner is to ascertain the residence of "the persons paying the taxes on the respective parcels during the last preceding year in which taxes were paid," by an examination of the collector's books. If he examined those books and ascertained who paid the taxes during the preceding year, and sent the notice to that person, he fully complied with all the requirements of the statute, and his affidavit to this effect is conclusive evidence of the correctness of the roll in that particular. There is no claim that the commissioner did not act in perfect good faith in sending the notice to Dodge and there is no contention that the premises did not appear upon the collector's books in his name. It makes no difference that the real owner of the property did not receive the notice. The tax might have been paid by an entire stranger, or by a mortgagee, or by some person who had previously owned the land and at the time of payment had parted with the title. It makes no difference that the land may have been assessed in the name of Dodge by mistake. Full compliance with the statute gave the court the necessary jurisdiction over the property to subject it to the payment of the assessment. The judgment of confirmation was legal and valid and in strict conformity with the requirements of the statute.

We have always held that where a special assessment has been confirmed and application is made for judgment and order of sale upon delinquent installments, the validity of the assessment cannot be attacked except for matters going to the jurisdiction of the court to render the same, the application for judgment and order of sale being a collateral proceeding. (*Johnson v. People*, 189 Ill. 83; *Steenberg v. People*, 164 id. 478; *Gross v. People*, 172 id. 571; *Foster v. City of Alton*, 173 id. 587; *Glover v. People*, 188 id. 576.) We have also held that such want of jurisdiction in the county court must appear upon the face of the record itself, otherwise it cannot be taken advantage of. (*Young v. People*, 171 Ill. 299; *Dickey v. People*, 160 id. 633; *Casey*

v. *People*, 165 id. 49.) In this case the judgment of confirmation is regular upon its face, showing that every provision of the statute has been complied with and that the court had jurisdiction to confirm the roll. The objection urged by appellee does not appear upon the face of the record, but is made apparent from evidence *aliunde*. It is not even claimed that the authorities levying the assessment have been guilty of any fraud. The objection should have been overruled.

The judgment of the county court is reversed and the cause remanded, with directions to render judgment for the delinquent assessment, together with an order of sale of the premises.

Reversed and remanded, with directions.

MAX WEBER

v.

ORDELL H. POWERS.

Opinion filed December 22, 1904—Petition stricken Feb. 9, 1905.

1. JUDGMENTS AND DECREES—*authority to confess judgment must be strictly pursued.* Authority to confess judgment without process must be clear and explicit and must be strictly pursued, and if there is no power to enter the debtor's appearance and confess judgment the judgment is a nullity and may be collaterally attacked for want of jurisdiction.

2. SAME—*judgment by confession must be for a fixed and definite sum.* A judgment by confession must be for a fixed and definite sum, and not in confession of a fact that can only be established by testimony outside of the written documents required by the statute to be filed in order to authorize entry of a judgment by confession.

3. LEASES—*exception to rule that holding over creates new tenancy.* The rule that where a tenant for years holds over at the expiration of the lease, the landlord, at his election, may treat the tenant as a tenant for another year upon the same terms as in the original lease, is subject to the condition that such holding over is not under any new arrangement.

4. SAME—*holding over does not authorize judgment by confession under lease.* A power to confess judgment for rent accruing during the term of the written lease to which it is attached cannot be extended to the implied contract resulting from the tenant's holding over, so as to authorize confession of judgment for rent accruing, after the term, under the implied contract.

5. SAME—*whether holding over creates new tenancy is a question of fact.* Whether holding over creates a new tenancy is a question of fact for the jury under the instructions of the court, and to permit such question to be determined by the confession of it in a cognovit made under the original lease, which has expired by limitation, and by the judgment of confession entered in pursuance of the cognovit, would be to deny the tenant the right of trial by jury.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JONAS HUTCHINSON, Judge, presiding.

This was a motion to vacate a judgment by confession, entered on May 6, 1903. The motion to vacate was denied, and the order denying it was entered on May 16, 1903, by the Superior court of Cook county. An appeal from said order was taken to the Appellate Court, and the Appellate Court affirmed the order denying the motion to vacate the judgment, granting at the same time a certificate of importance. The present appeal is from such order of affirmance.

The facts are substantially as follows: The declaration was filed on May 6, 1903, in the Superior court of Cook county, and avers that on May 14, 1900, the plaintiff below, appellee here, demised 4346 Forestville avenue in Chicago to the defendant below, the appellant here, for and during the term of twenty-three months, commencing on the first day of June, 1900, and ending on April 30, 1902, and that said demise was on, to-wit, the first day of May, 1902, renewed for a period of one year, beginning on to-wit, May 1, 1902, "and paying therefor during the said term and the renewal thereof to the said plaintiff the rent at the rate of \$600.00 per year, payable monthly, that is to say, on the first

day of each and every month of said term in advance by even and equal installments of \$50.00 each, by virtue of which said demise the said defendant entered into possession of the said demised premises," and was possessed thereof from the first day of October, 1902, until the . . . day of April, 1903, during which period a large sum of money, to-wit, the sum of \$350.00, of seven liquidated installments of \$50.00 each (mentioning them,) became and was due and payable from the said defendant to the said plaintiff, and is unpaid, whereby an action has accrued to the plaintiff to have and demand from the defendant the sum of \$350.00, parcel of the said sum above demanded.

The cognovit was filed on the same day, May 6, 1903, and recites that the defendant, by his attorney, comes and defends the wrong and injury, when, etc., and waives service, and says "that he cannot deny the action of the said plaintiff, nor but that he, the said defendant, owes and is indebted to the said plaintiff in manner and form as the said plaintiff has above complained against him, nor but that the said plaintiff has sustained damages on occasion of the non-performance of the several agreements and undertakings of said declaration mentioned, including the sum of \$20.00 attorneys' fees for his reasonable attorneys' fees for entering up this judgment, over and above other costs and charges by him about his suit in this behalf expended to the amount of \$370.00," and defendant waives errors and appeal "on the judgment entered by virtue hereof." There was an affidavit of plaintiff's agent to the effect that defendant was indebted in the sum of \$360.00 and \$20.00 attorneys' fees. Plaintiff also filed an affidavit with the declaration that he owns the premises, and knows the handwriting of Max Weber, and that the signature on the attached lease is that of Max Weber who is still living, and that there is due as rent under the renewal of said lease \$350.00.

The lease, containing the warrant of attorney filed in the cause, is dated May 14, 1900, and made by appellee to

appellant, demising said premises, "to have and to hold the same unto the party of the second part from the first day of June, A. D. 1900, until the last day of April, A. D. 1902. And the party of the second part, in consideration of said demise, does covenant and agree with the party of the first part as follows: First, to pay as rent for said demised premises the sum of \$1150.00, payable in monthly installments of \$50.00 each in advance, upon the first day of each and every month of said term, at the office of Draper & Kramer."

The lease contains also the following provision: "Eighth—At the termination of this lease by lapse of time or otherwise, to yield up immediate possession to said party of the first part, and, failing so to do, to pay, as liquidated damages for the whole time such possession is withheld, the sum of \$5.00 per day. * * * The party of the second part hereby irrevocably constitutes any attorney of any court of record of this State attorney for him in his name * * * to enter appearance in such court, waive process and service thereof, and confess judgment from time to time for any rent which may be due to said party of the first part, or the assignee of said party, by the terms of this lease, with costs and \$20.00 attorney's fees, and to waive all errors and all right of appeal from said judgment and judgments, and to file a consent in writing, that a writ of restitution or other proper writ of execution may be issued immediately," etc. The lease is under seal.

The judgment, entered upon the same day, to-wit, May 6, 1903, was as follows: "And now on this day comes the plaintiff to this suit by Jule F. Brower and Samuel B. King, his attorneys, and files herein his certain declaration in a plea of trespass on the case upon promises, and thereupon also comes the said defendant by Otis King Hutchinson, his attorney in fact, and files herein his warrant of attorney, the execution of which being duly proven, and also his cognovit confessing the action of the plaintiff against him, the said defendant, and that the plaintiff has sustained damages here-

in by reason of the premises against him, the said defendant, to the sum of three hundred seventy dollars, and no cents, on motion of plaintiff leave is given him by the court to enter up a judgment herein for the amount due on the lease filed in said cause, together with attorney's fees, as provided in said warrant of attorney. Therefore, it is considered by the court that the plaintiff do have and recover of and from the defendant his said damages of three hundred seventy dollars, and no cents, in form as aforesaid by the said defendant confessed, together with his costs and charges in this behalf expended and have execution therefor."

The bill of exceptions was filed on July 18, 1903, and recites that, on the hearing of the motion made by the defendant to set aside and vacate the judgment by confession entered in said cause on May 6, 1903, and to quash the execution issued thereon, and for leave to plead to the declaration filed therein, which hearing was had on the 16th day of May, 1903, the defendant, to maintain said motion, submitted the same in writing, and assigned the following reasons in favor thereof, to-wit: (1) That the rendition of the judgment herein was improper and illegal. (2) That no power to confess the judgment entered herein was given by the defendant, Max Weber, in and by said lease and warrant of attorney attached to the declaration. (3) That the lease attached to the declaration, and in which a warrant to confess judgment was contained, expired by its own limitation on the 30th day of April, 1902, and that no new lease was signed, or any written agreement entered into by the defendant, Max Weber. (4) That the declaration alleges the lease to have expired on April 30, 1902, and that on May 1, 1902, a new contract for a period of one year was entered into by the parties, and no statement is contained in the declaration as to whether said new contract was a valid or written contract, and no warrant of attorney to confess judgment under said new contract alleged in the declaration is attached thereto, or was presented to or filed in court. (5) That a

lease filed in this case, of which the warrant of attorney is a part, expired on the 30th day of April, 1902, and the declaration shows that the rent, claimed as due, and for which judgment was rendered, accrued after April 30, 1902, and under the new contract alleged in said declaration and after the said warrant of attorney had expired. (6) That at the time of the rendition of the judgment the defendant was not indebted to the plaintiff in the sum of \$370.00, or in any sum whatever.

The bill of exceptions also recites that the defendant read in evidence in support of his motion his own affidavit, in which he states that he entered into the lease in question with the plaintiff, Powers, for a period from June 1, 1900, to April 30, 1902, at a yearly rental of \$1150.00, payable monthly at the rate of \$50.00 per month, as is stated in the lease; that before the expiration of the lease, on to-wit, April 20, 1902, a representative of the plaintiff asked affiant if he wanted to make a new lease of the said premises from May 1, 1902, to April 30, 1904, and affiant then refused to enter into a new lease for said premises, stating, however, that if the plaintiff would make certain repairs on and about said property to the satisfaction of affiant, affiant would execute such a lease; that, shortly before the expiration of the lease and prior to May 1, 1902, the plaintiff, Powers, called on affiant, and asked him if he would be willing to remain at the rate of \$50.00 per month for rental; that affiant agreed to remain provided Powers would make certain repairs within a reasonable time, and that, after making the repairs within a reasonable time, affiant would sign the lease; that Powers accepted the proposition, and that this agreement was made during April, 1902; that affiant then remained in possession until the latter part of September, 1902, waiting for such repairs to be made, and paid all the rent to Powers for all the time he was in occupation of said premises; that Powers did not make all the repairs as agreed to by him, but attempted from time to time to make a few repairs, and, in

the latter part of September, 1902, said repairs were not finished, and, therefore, this affiant during the month of September, 1902, moved out of said premises and surrendered the keys and the possession thereof to the plaintiff; that affiant vacated the premises because plaintiff would not and did not fulfill his contract to make repairs, and because of the fact that the premises were in such a condition occasioned by the plaintiff herein, that this affiant was deprived of the beneficial enjoyment of said premises; that the lease expired April 30, 1902, and no new lease was executed, except the verbal agreement above stated, being a tenancy from month to month; that affiant was not indebted to the plaintiff in any sum at the time of the entry of the judgment by confession herein; that no warrant of attorney was signed by him, except the one contained in the lease which expired on April 30, 1902, and that he at no time authorized any attorney in any manner to appear for him in the above entitled cause, and confess judgment; and that he has a good defense to this action upon the merits to the whole of the plaintiff's demand.

The bill of exceptions also stated that the plaintiff, Powers, read in evidence his own affidavit in opposition to the motion of the defendant to vacate the judgment, and therein swore that prior to May, 1902, when the lease between him and Weber—being the instrument sued on—expired, affiant agreed with Weber that the latter should remain in possession of the premises at the same rental reserved in the lease, namely, \$50.00 per month, and upon the same conditions and terms set forth in the said lease, and affiant agreed to execute a new lease of the said premises upon the same conditions, terms and promises as set forth in said lease; that, during the month of August, 1902, and subsequent to May 1, 1902, Weber agreed with affiant to sign a two-year lease of said premises upon the same conditions as set forth in said lease expiring April 30, 1902, and that this affiant agreed at the same time to make certain repairs amounting to \$100.00;

that the same were made, and the making of the same superintended by said Weber, and his wife, and completed to their satisfaction before Weber vacated the premises; that, when the repairs were made, no time was set by Weber, or by affiant, when they were to be made, but Weber requested affiant to permit him and his wife to superintend them and attend to the same, which they did; that affiant was not aware that Weber had vacated the premises until he received a letter from him, dated October 11, 1902, telling him to call and get the keys for the house on the premises, and stating that they had been ready for Powers since Monday, and asking him to call for the same at 4404 Prairie avenue; that affiant called upon Weber about September 15 at his office, and Weber refused to sign the lease, and stated that he intended to vacate the premises because the price of coal for heating the house was high, and that he intended to move into a steam heated apartment to save the expense of heating the house; that appellant never complained to affiant that any of the repairs were not such as affiant had agreed to make, or as to their sufficiency and extent, but expressed his satisfaction with them; that Weber did not vacate the premises until October 1, 1902, and, when he abandoned the same, neglected to lock the same, but left the front door unlocked.

The bill of exceptions also states that a certain affidavit of one Crawford was read in evidence by the plaintiff in opposition to the motion, in which Crawford stated that he made the repairs and decorations upon the premises upon the order of Powers, and that Weber's wife selected the colors, styles and materials for the decorations and repairs from the firm of which Crawford was foreman, and superintended the same, and that the same were completed to the satisfaction of Weber; that, when they were made, no time was set by either Weber or Powers when they should be made, but Weber requested affiant to permit him and his wife to superintend the same, which they did; and that the same were finished before August 20, 1902.

KRAUS, ALSCHULER & HOLDEN, for appellant:

The judgment is void and should be vacated, regardless of the merits. *Chase v. Dana*, 44 Ill. 262; *Mayer v. Pick*, 192 id. 561; *Frye v. Jones*, 78 id. 627; *Whitney v. Bohlen*, 157 id. 571; *Blake v. Bank*, 178 id. 182.

A warrant of attorney to confess judgment must be in writing, and in itself specify the very debt for which judgment may be confessed. Practice act, sec. 65; *Roundy v. Hunt*, 24 Ill. 598; *Chase v. Dana*, 44 id. 262; *Tucker v. Gill*, 61 id. 236; *Frye v. Jones*, 78 id. 627; 1 Tidd's Practice, 552; *Little v. Dyer*, 138 Ill. 272; Anderson's Law Dic.; *Rabe v. Heslip*, 4 Pa. St. 139.

The warrant of attorney in the original lease is not authority to confess judgment for rent accruing on holding over. *Smith v. Pringle*, 100 Pa. St. 275.

There was no holding over, but a mere tenancy at will or on condition, pending the execution of a lease, under express new agreements. 2 Taylor on Landlord and Tenant, (9th ed.) sec. 524; 1 Wood on Landlord and Tenant, secs. 13, 14.

The old expired written lease is not a written contract under which the rights of the parties are construed upon a holding over. It is only evidence of an implied contract. 1 Wood on Landlord and Tenant, pp. 30, 32, note; 2 Taylor on Landlord and Tenant, (9th ed.) sec. 525; *Stewart v. Apel*, 5 Houst. 189; *Kimpton v. Eve*, 2 V. & B. 353.

JULE F. BROWER, and SAMUEL B. KING, for appellee:

There is a presumption in favor of a judgment entered by confession under warrant of attorney that the court heard evidence sufficient to sustain the allegations of the declaration. *Boyles v. Chytraus*, 175 Ill. 370; *Bush v. Hanson*, 70 id. 480.

The appeal from an order overruling a motion to vacate a judgment by confession does not open for review alleged errors in the judgment itself. *Mumford v. Tolman*, 157 Ill. 258; *Knox v. Bank*, 57 id. 330.

In the absence of any propositions of law presented to the trial court upon motion to vacate a judgment by confession, questions of law cannot be considered by the Supreme Court upon further appeal from the Appellate Court. *Pearce v. Miller*, 201 Ill. 188.

Where a holding over by a tenant after the expiration of a previous lease is under an agreement modifying such previous lease in one particular, such modification will not constitute a new agreement that will rebut the presumption of a holding over under the terms of the old tenancy, but under such circumstances the holding over would be under the terms of the old agreement as so modified. *Miller v. Ridgely*, 19 Ill. App. 306.

Warrant to confess judgment is a security for the obligation upon which it authorizes confession. *Bush v. Hanson*, 70 Ill. 480.

The renewal or extension of a lease which is implied from holding over after the expiration of a previous term, carries with it all covenants and extends all dates of the original letting, so as to make them applicable to the extended term. *Gardner v. Dakota Comrs.* 31 Minn. 33; *Wadsworth v. Wadsworth*, 21 Weekly Dig. 520.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The material question, presented by the record in this case, is whether the appellee was authorized by the power of attorney to confess judgment to enter up a judgment for rent, alleged to have accrued after the expiration of the written lease, and while appellant was in possession of the premises after such expiration either by virtue of holding over under the lease, or by virtue of a new agreement made between the parties.

By the terms of the written lease, under which appellant originally entered, he was to hold the premises from the first

day of June, 1900, until the last day of April, 1902, a period of twenty-three months, and to pay as rent therefor "the sum of \$1150.00, payable in monthly installments of \$50.00 each in advance upon the first day of each and every month of said term." Appellant paid all the rent due by the terms of the written lease up to the last day of April, 1902. He remained in possession five months after the lease expired, and until the latter part of September, 1902, when he abandoned the premises. He paid rent at the rate of \$50.00 per month for each of the five months, during which he remained in possession after the expiration of the lease. The judgment was entered for rent at the rate of \$50.00 per month for the seven months inclusive from October 1, 1902, when appellant left the premises, up to May 1, 1903, together with costs and attorneys' fees. Did appellee have any authority, under the warrant of attorney contained in the lease, to enter up judgment by confession against appellant for the period of seven months from October 1, 1902, to May 1, 1903?

Certainly, the warrant of attorney, contained in the lease, did not in express terms confer any authority to enter up judgment for any rent accruing after April 30, 1902, when the term mentioned in the written lease expired.

It is claimed, on the part of appellee, that, after April 30, 1902, the date of the expiration of the lease, appellant held over with the consent of the appellee, the landlord, upon the same terms and conditions, which are prescribed in the original lease, and that, inasmuch as the landlord was authorized by the terms of the lease to enter up judgment for the rent accruing while the lease was in force, he was also authorized to enter up judgment for the rent, which accrued while the appellant was holding over, it being contended that the power to confess judgment was continued after the expiration of the lease during the period of the holding over by the appellant, if there was such holding over.

It is the settled doctrine of this court, that the authority to confess a judgment without process must be clear and

explicit, and must be strictly pursued; and that, if there is no power to enter the appearance of the debtor and confess the judgment, such judgment is a nullity, and binds no one, and may be attacked collaterally for want of jurisdiction in the court to render it. (*Chase v. Dana*, 44 Ill. 262; *Tucker v. Gill*, 61 id. 236; *Roundy v. Hunt*, 24 id. 598; *Frye v. Jones*, 78 id. 627; *Mayer v. Pick*, 192 id. 561; *Whitney v. Bohlen*, 157 id. 571; *Blake v. State Bank of Freeport*, 178 id. 182; *Krickow v. Pennsylvania Tar Manf. Co.* 87 Ill. App. 653; *Hall v. Hamilton*, 74 Ill. 437; *Frear v. Commercial Nat. Bank*, 73 id. 473; *Little v. Dyer*, 138 id. 272).

Here, the warrant of attorney authorized any attorney of any court of record "to enter (appellant's) appearance in such court, waive process and service thereof and confess judgment from time to time for any rent, which may be due to said party of the first part * * * by the terms of this lease." The only rent, which might be due to appellee by the terms of the written lease, was the sum of \$1150.00, payable in monthly installments of \$50.00 each in advance, upon the first day of each and every month during the period of twenty-three months, extending from June 1, 1900, to April 30, 1902. For any of the installments of rent at the rate of \$50.00 per month, which might be due during this period of twenty-three months, and which was a part of the sum of \$1150.00, judgment by confession could be entered up. But the warrant of attorney confers no authority to confess judgment for any other amounts, or for any amounts accruing during any other period. The warrant of attorney does not authorize the confession of judgment for rent, which may be due according to the terms of an oral demise, existing after the expiration of the written lease. The lease itself does not contain any covenant or agreement on the part of the lessor for a renewal of the lease. The old, or written, lease is not the contract of the parties for a new term, but is only evidence to uphold the implied contract, resulting from the holding over of the tenant. (1 Wood on Landlord and

Tenant, sec. 13). Such holding over, where it exists, becomes in effect a parol demise during the holding, and will be barred in due time by the Statute of Limitations. (2 Taylor on Landlord and Tenant, sec. 525; *Stewart v. Apel*, 5 Houst. (Del.) 189).

Parol evidence must be resorted to to show that, where the tenant remains in possession after the expiration of the written lease, he holds over under the terms of such lease. A power to confess judgment for the rent, due by the terms of the written lease, cannot be construed into a power to enter up judgment for rent accruing under an implied contract, resulting from the fact of a holding over by the tenant. In this case, to give the warrant of attorney such a construction, would be in violation of the rule, that such warrants of attorney should be strictly construed.

"Where a tenant for a year or years holds over after the expiration of his lease, without having made any new arrangement with his landlord under which such holding over takes place, the landlord, at his election, may treat the tenant as a trespasser, or as a tenant for another year, upon the same terms as in the original lease, and this though the tenant has no intention of holding over for a year, or of paying the same rent. The law fixes the tenant's liability for holding over, independent of his intention. The legal presumption of a renewal from the holding over cannot be rebutted by proof of a contrary intention on the part of the tenant alone." (*Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 151). The right of election as to whether the tenant, remaining in possession after the expiration of the lease, is holding over upon the same terms as in the original lease is a right, which belongs to the landlord, and not to the tenant. It is the landlord alone, whose intention on the subject is to be ascertained, as it is he alone, who may elect to treat the tenant as holding over under the terms of the old lease. (*Keegan v. Kinnare*, 123 Ill. 280). It is true, that, as a general rule, the law by implication creates a new tenancy from year

to year, where the tenant holds possession of the premises after the expiration of a lease for year, or years, under which he went into possession, but such implication is not conclusive; it may be rebutted by the acts of the parties; and it is a question of fact for the jury to determine, under the instructions of the court, whether or not the holding over is such as to create a new tenancy. While the legal presumption of a renewal of the tenancy from the holding over of the tenant cannot be rebutted by proof of a contrary intention on the part of the tenant alone, it can be rebutted by proof of a contrary intention on the part of the landlord alone, or on the part of both parties. (*Clinton Wire Cloth Co. v. Gardner, supra*). If it be a question of fact to be determined by the jury, under the instructions of the court, whether the holding over is such as to create a new tenancy, then such question of fact cannot be determined by a confession of it in a cognovit, and by a judgment of confession, entered in pursuance of such cognovit. So to hold would be to deprive the debtor of his right to a trial by jury. The debtor, in authorizing a confession of judgment against him for rent, due by the terms of a written lease which he has signed, cannot be thereby made to confess judgment in favor of a renewal of such lease, or in favor of a holding over under such lease. The fact of a renewal, or the fact of a holding over, is a fact *dehors* the written lease and the terms of the written power of attorney, contained in the lease. A judgment by confession must be for a fixed and definite sum, and not in confession of a fact, that can only be established by testimony outside of the written documents, required by the statute to be filed in order to enter up a judgment by confession.

In *Smith v. Pringle*, 100 Pa. St. 275, the Supreme Court of Pennsylvania held that a confession of judgment for a term certain has reference to that particular term only, and does not authorize the entry of judgment for rent, accruing after the expiration of the term certain where the tenant has held over. In that case, a judgment by confession was en-

tered up for a certain amount upon a confession of judgment, contained in a lease of certain premises executed by Pringle to Smith. Smith obtained a rule to show cause why the judgment should not be opened, and he be let into a defense, which rule was afterwards made absolute, but the judgment was reversed, and the court there said: "The judgment in this case was entered under the power contained in the lease by Pringle to Smith for one year from April 1, 1875, at the rent of \$450.00. The judgment was confessed for the full sum of \$450.00 evidently to secure the payment of that rent. There is nothing to extend it as security beyond that amount. The renewal of the lease by the tenant continuing in possession clearly would not do so. When, therefore, the rent for the term of the lease was paid, the judgment was paid. The implied renewal of the lease could not revive the judgment once extinguished and dead. That the plaintiff might have recovered the rent accruing subsequently was nothing to the purpose." So, in the case at bar, the warrant of attorney gave authority to confess judgment for \$1150.00, or for monthly installments of that sum amounting to \$50.00 each, and accruing during the period of twenty-three months from June 1, 1900, to April 30, 1902. The warrant of attorney could not be extended as security beyond that amount, and the continuation of appellant in possession beyond the expiration of the lease could not do so. When appellant paid all the rent, amounting to \$1150.00, which became due in monthly installments during the period of twenty-three months, he paid all the money, for which the warrant of attorney authorized judgment to be entered up against him. The power, conferred by the warrant of attorney, was thereby exhausted, and could not be revived by an implied contract, resulting from a holding over by appellant. Counsel for appellee say that a warrant of attorney to confess judgment is a familiar common law security, and is extended with the extension of the principal obligation, citing *Bush v. Hanson*, 70 Ill. 480. Undoubtedly,

if the principal obligation, named in the present lease, that is to say, the obligation to pay \$1150.00 of rent in monthly installments during a period of twenty-three months, had been assigned by appellee, the security afforded by the warrant of attorney would have passed to such assignee. But in such case the debt assigned would be the same debt, for which the warrant of attorney authorized the confession of judgment, and not a new and different debt, accruing subsequently, and growing by implication out of a holding over by the tenant.

The rule that, where a tenant for year or years holds over after the expiration of his lease, the landlord, at his election, may treat the tenant as a tenant for another year upon the same terms as in the original lease, is subject to the condition, that such holding over after the expiration of the lease is not under any new arrangement, made by the landlord with the tenant. The rule does not apply where there is a new contract between the landlord and tenant, under which the latter remains in possession. (*Clinton Wire Cloth Co. v. Gardner, supra*; *Keegan v. Kinnare, supra*; *Goldsbrough v. Gable*, 140 Ill. 269). The doctrine is thus stated in 18 Am. & Eng. Ency. of Law,—2d ed.—p. 407: "In the absence of any express stipulations, the new tenancy, created by a tenant's holding over after the expiration of his lease, is implied by law to be upon the same terms and subject to all the covenants contained in the expired lease." In *Prickett v. Ritter*, 16 Ill. 96, it was held that, where a tenant under a lease for a year or years, or for a stated period, holds over, it will be construed as an implied agreement, that he shall hold over for a corresponding period upon the same terms as to rent and times of payment, unless there be some act of one or of both the parties, which rebuts the implication. (See also *Hunt v. Morton*, 18 Ill. 75; *McKinney v. Peck*, 28 id. 174).

In the case at bar, the affidavits, filed upon the motion to vacate the judgment and for leave to plead to the declara-

tion, show that there was some new arrangement between appellee and appellant in reference to holding over, and to the continued possession of the premises by the appellant. Appellant in his affidavit swears that appellee, or his representative, proposed to him before the expiration of the written lease to give him a new lease of the premises for two years, and that appellant agreed to remain upon the premises, and pay the same rent which he had already paid, on condition that certain repairs should be made. Appellee himself in his affidavit swears that, before the expiration of the old lease, he agreed with appellant that the latter should remain in possession of the premises at the same rent and upon the same terms, and that appellant agreed to execute a new lease upon the same conditions, terms and promises as set forth in the old lease; and he also swears that in August, 1902, after the expiration of the lease, appellant agreed with him to sign a lease of the premises for two years upon the same terms as set forth in the old lease which expired on April 30, 1902. The new agreement, thus made between the parties, was different from the old agreement. The old agreement provided for a demise of the premises for a period of twenty-three months, while the new agreement provided for a demise of the premises for a period of two years. The presumption, which would arise from the holding over by the appellant, would be that the tenancy was renewed for a period of twenty-three months, or for one year. But this presumption is rebutted by the statement, made in the affidavits, that the parties agreed upon a lease for two years, one of them saying that such lease was to be made absolutely and without condition, and the other, that it was to be made upon the condition that certain repairs were to be made by the lessor. The new arrangement made, or sought to be made, as set forth in the statement preceding this opinion, is inconsistent with the idea, that appellee, as landlord, was treating the appellant as a tenant holding over under the same terms, as were prescribed by the lease.

It is true that the new agreement for a lease for a period of two years was an oral agreement, and, under the Statute of Frauds, was void as being an agreement that was not to be performed within the space of one year from the making thereof. (2 Starr & Curt. Ann. Stat.—2d ed.—p. 1991). But although the agreement may have been void under the Statute of Frauds, yet inasmuch as the treatment by the landlord of the tenant, who holds over, as one who holds over under the terms and conditions of the old lease, is a matter of intention on the part of the landlord, such void verbal agreement serves to explain the holding over after the expiration of the written lease, and to show that it was not upon the terms of the original lease. That such a new verbal contract, void under the Statute of Frauds, may serve to show that the landlord did not intend to treat the tenant as holding over under the terms of the original lease, was held by the Supreme Court of Alabama in the case of *Crommelin v. Theiss & Co.* 31 Ala. 412, and approved of by this court in *Clinton Wire Cloth Co. v. Gardner*, *supra*. It being true, then, that the execution of a new agreement between the parties, or the pendency of a treaty between them for a further lease, rebuts the presumption, that appellee intended to treat appellant as a tenant holding over under the old lease, it cannot be said that the power conferred by the warrant of attorney to confess judgment for rent, due under the old lease, was continued after the expiration of such lease, and warranted the entry of judgment against the appellant for the rent accruing after such expiration. If appellant was not holding over under the terms and conditions of the old lease, he was not holding over subject to the right of the appellee to enter judgment under the warrant of attorney, as expressed in the old lease.

There is another qualification to the rule, already announced, as to the presumption of the implied contract from the fact of the holding over by the tenant. Taylor, in his work on Landlord and Tenant, (vol. 2,—9th ed.—sec. 525),

says: "Where the landlord suffers the tenant to remain in possession after the expiration of the original tenancy, the law presumes the holding to be upon the terms of the original demise, subject to the same rent and to the covenants of the original lease, so far at least as these are applicable to the new condition of things." The qualification here referred to is, that the covenants of the original lease shall be applicable to the new condition of things. If, in the present case, the warrant of attorney to confess judgment, as embodied in the lease, is a covenant, and not a mere collateral agreement, it cannot be said that it is applicable to the new condition of things, created by the holding over of appellant under the circumstances already stated. A power of attorney to confess judgment is a written instrument, and the covenant to pay rent, as embodied in the lease, is a written obligation. Therefore, the warrant of attorney in the lease is a written power of attorney to enter judgment upon a written obligation. If the warrant of attorney is applicable to the holding over as thus indicated, then there would be a mere oral or implied power of attorney to enter judgment upon an oral or implied contract. Therefore, upon the doctrine of inapplicability, it cannot be said that the authority to confess judgment was extended from the original lease to the subsequent implied contract, created by the holding over.

For the reasons above stated, we are of the opinion that the Appellate Court, and the superior court of Cook county, erred in denying the motion to vacate the judgment, and in refusing to allow appellant to plead to the declaration.

Accordingly, the judgments of the Appellate Court and of the Superior court of Cook county are reversed, and the cause is remanded to the superior court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

JULIA M. RAY

v.

EDWIN L. LOBDELL.

Opinion filed December 22, 1904—Rehearing denied Feb. 9, 1905.

1. MORTGAGES—*when assumption of mortgage must be express.* One who purchases only the vendor's equity of redemption in encumbered property is not personally liable to pay the encumbrance unless he expressly assumed and agreed to pay the same.

2. SAME—*when extension agreement does not make the grantee personally liable.* One to whom the equity of redemption in encumbered property is conveyed for the benefit of the mortgagor's creditors is not impliedly bound to personally pay the encumbrance by reason of an agreement between the holder of the encumbrance and attorneys representing the creditors, extending the time of payment, where he was not present personally or by an authorized representative when the agreement was made.

WRIT OF ERROR to the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. PHILIP STEIN, Judge, presiding.

This was a bill in chancery filed by the plaintiff in error in the superior court of Cook county to foreclose a trust deed executed by Willie W. Henderson to the plaintiff in error to secure the payment of his two promissory notes, for the sum of \$12,500 each, upon a leasehold interest for ninety-nine years in certain real estate located upon VanBuren street, in the city of Chicago. The defendant in error, at the time the suit was commenced, held the title to said leasehold interest for the benefit of the Bankers' Land Association, and the complainant sought by her bill to hold him personally liable for any deficiency which might remain unpaid after the sale of said leasehold interest. The issues were made up and the cause was referred to a master, and upon the coming in of his report a decree of sale was entered and the leasehold interest was sold. Afterwards the master reported a deficiency,

and a decree for the sum of \$26,521.08 was rendered against defendant in error, which decree for said deficiency, on appeal to the Appellate Court for the First District, was reversed, and the complainant has sued out this writ of error.

MYRON H. BEACH, for plaintiff in error.

ULLMANN & HACKER, DEFREES, BRACE & RITTER, and SEARS, MEAGHER & WHITNEY, (NATHANIEL C. SEARS, and WILLIAM BRACE, of counsel,) for defendant in error.

Mr. JUSTICE HAND delivered the opinion of the court:

The sole question presented in this case for determination is, at the time the defendant in error acquired title to said leasehold interest did he assume and agree to pay the indebtedness secured by said trust deed in such manner as to make him personally liable in this proceeding for any deficiency which might remain unpaid thereon after a sale of said leasehold interest? There is no contention that the defendant in error, at the time he acquired title to said leasehold interest, assumed or agreed to pay the encumbrance thereon by express contract, but it is urged the law raised an implied promise on his part to pay, by reason of the fact that the amount of the trust deed was deducted from the purchase price at the time that he acquired title to the leasehold interest, the contention of plaintiff in error being that the leasehold interest was purchased by the defendant in error for \$40,000; that the encumbrance, \$25,000, was deducted therefrom; that \$15,000 of the purchase money was paid, and that \$25,000, the balance of the purchase money, remained in his hands with which to pay said encumbrance, hence his liability.

There is but little chance for controversy as to the law governing this case, as the rule is well settled in this State, if the encumbrance is deducted from the purchase price (*Comstock v. Hitt*, 37 Ill. 542; *Rapp v. Stoner*, 104 id. 618; *Siegel*

v. *Borland*, 191 id. 107;) the grantee becomes liable for the debt. The controlling question, therefore, is one of fact.

It appears from the evidence that Lobdell, Farwell & Co., a corporation, of which the defendant in error was president, was engaged in loaning money and handling commercial paper in the city of Chicago; that the Harvey Lumber Company, also a corporation doing business in the city of Chicago, had outstanding notes, drafts, accounts, etc., to an amount exceeding \$88,000, a portion of which indebtedness was held by Lobdell, Farwell & Co. and the balance of which had been negotiated by said company; that to secure said indebtedness said Harvey Lumber Company had conveyed to a trustee or trustees its equity in five pieces of Chicago real estate, including said leasehold interest; that subsequently it became apparent to the Harvey Lumber Company and its creditors that it could not pay said indebtedness, at least in cash, and an arrangement was made between said Harvey Lumber Company and its creditors that it should convey or have conveyed to the defendant in error, for the benefit of said creditors, three pieces of said real estate and said leasehold interest, subject to the encumbrances thereon, in full payment and satisfaction of the indebtedness for which said real estate and leasehold interest were then held as security. Prior to such transfers an expert examined the different pieces of real estate, including the leasehold interest, proposed to be taken in satisfaction of said indebtedness and fixed a valuation thereon. In his report to the creditors of said company said leasehold interest was valued at \$40,000, encumbrance \$25,000, equity \$15,000. Thereafter the three pieces of real estate and the leasehold interest, which, according to said report, were valued at \$208,000 and which were encumbered to the amount of \$95,600, leaving an equity therein of \$112,400, were conveyed to the defendant in error in payment and satisfaction of \$88,072.32 in the notes and accounts of the Harvey Lumber Company, which notes and accounts were surrendered and canceled. During the negotiations be-

tween the Harvey Lumber Company and its creditors, the creditors of the Harvey Lumber Company, for the purpose of handling the properties which the Harvey Lumber Company proposed to convey to the defendant in error for the benefit of said creditors, entered into a voluntary association known as the Bankers' Land Association. After said properties were conveyed to defendant in error, he paid with the funds of the association the back taxes and ground rent upon the lease, and the interest upon the notes secured by the trust deed to January 1, 1894, and \$5000 upon the note first maturing, and \$2500 of said note was extended one year, and the balance thereof, \$5000, and all of the other note was extended five years. The deed conveying the leasehold interest to the defendant in error was made to him individually, and recited a consideration of one dollar and that the deed was made subject to said trust deed.

It clearly appears that the creditors of the Harvey Lumber Company, who were mainly banking corporations and individuals engaged in loaning money, several of whom were not residents of the State, who had purchased the paper of said Harvey Lumber Company, had not, at the time title to said leasehold interest and other properties was taken by defendant in error, voluntarily entered upon the purchase of real estate in the city of Chicago, but found themselves the holders of a large amount of over-due paper of a corporation which was unable to meet its obligations and whose assets consisted mainly of equities in heavily encumbered Chicago real estate. To meet the situation then confronting them, they accepted, in satisfaction of the obligations which they held against said corporation, the equities which it held in three pieces of Chicago real estate and said leasehold interest, which equities said corporation conveyed or caused to be conveyed to defendant in error for their benefit. The creditors of the Harvey Lumber Company, for whom the defendant in error took title to said leasehold interest and other properties, did not purchase said properties for cash, but released the in-

debtedness of the Harvey Lumber Company to the members of the association in exchange for the equities of the Harvey Lumber Company in said properties, including said leasehold interest. No purchase money was agreed to be paid to the Harvey Lumber Company, and after the delivery of deeds to the defendant in error no purchase money remained in the hands of the members of the association or in the hands of the defendant in error. While it may be true that the valuations fixed by the expert and afterwards carried on to the books of the association were the valuations that controlled the creditors of the Harvey Lumber Company in determining whether they would accept deeds to said properties, including said leasehold interest, and release and discharge the indebtedness of the Harvey Lumber Company held by the members of the association, it cannot be said that the leasehold interest was purchased at \$40,000 or any other sum. The Harvey Lumber Company owed the members of the association \$88,072.32. It owned equities which the expert estimated of the value of \$112,400, which it offered to give the members of the association in exchange for the release and satisfaction of said indebtedness. The members of the association had the choice to accept the equities of the Harvey Lumber Company in said properties and release said indebtedness, or to enforce their lien. The members of the association elected to accept a transfer of the equities and released the indebtedness. Under such circumstances it would be inequitable to decree that the creditors, had deeds been made directly to them, had bound themselves to pay the encumbrances upon said properties in full, by reason of the fact they had employed an expert to report upon the value of the properties, the amount of the encumbrances and the equities of the Harvey Lumber Company remaining therein, and had used such report as the basis of their calculations in making a settlement of the indebtedness of the Harvey Lumber Company. If it would be inequitable to hold the creditors of the Harvey Lumber Company liable for said encumbrances

it would be doubly so to hold the defendant in error liable for the payment thereof, who took title to said premises only for the benefit of said creditors.

In *Rapp v. Stoner*, *supra*, the consideration stated in the deed was \$15,000, and the deed was made subject to three mortgages, aggregating \$10,070. The difference between these two amounts was paid by the grantee by the conveyance to the grantor of a Kansas farm, consisting of five hundred and sixty acres. It was sought to hold the grantee personally liable on the ground the amount of said mortgages had been deducted from the purchase money and remained in his hands, by reason of which fact it was contended he was equitably bound to pay said mortgages. The court, on page 624, said: "In this case there is, perhaps, no doubt, from the evidence, that the parties, in making the trade, estimated the value of the Stoner lots at some \$15,000. The encumbrances were known to be some \$10,000 and the Kansas lands estimated at some \$5000; but there was no such deduction of the ten thousand dollar encumbrance from the purchase money agreed to be paid, and leaving it in the hands of the purchaser, as to create a personal liability. It may be, if Reiss had paid \$15,000 to Stoner for the property and the latter had left in the hands of Reiss \$10,000 of the amount, to be paid by him in discharge of the mortgages, the money might, under such circumstances, be regarded as a trust fund and Reiss as a trustee, holding the money for the benefit of those who had the mortgages. But no such case is presented by this record. Here was a mere exchange of Kansas lands for encumbered property. Doubtless Reiss expected, when he made the trade, that he would, in time, pay off the encumbrances and clear the property of all liens. Unless he entertained this expectation it would have been folly on his part to have made the trade and paid anything for a deed from Stoner; but the fact that he expected to pay the mortgages, and even paid some interest to holders of the mortgages, cannot be held sufficient to fix his personal liability."

In *Siegel v. Borland*, *supra*, there was an exchange of properties, the property acquired by appellant being subject to a mortgage. There was no express agreement on his part to pay the mortgage, but it was held by the court below that an implied agreement to assume the same arose out of the transaction. In reversing the decree, on page 111, it was said: "The deed was to be made, and was made, subject to the trust deed. The contract and deed not only failed to imply any assumption of the debt, but rather excluded the implication. Complainant can only establish the liability of appellants by proving a contract to assume and pay the debt, or some part of it. To sustain the decree, the facts proved must amount to an agreement to pay the \$25,000 upon the debt secured by the trust deed. It is true that a contract may be implied, and that if the amount of an encumbrance is included in and forms a part of the consideration which a grantee promises to pay for premises, and he retains that part of the purchase price, the law will create a personal liability against him, on the ground that he has agreed to pay such indebtedness. In such a case the law presumes that the grantee has agreed to apply the money so retained for the purpose of paying the encumbrance. Either there must be an express assumption of the indebtedness, or the amount must be allowed in the purchase price so that the law will imply the promise."

The rule to be deduced from the authorities is, if the vendee of land encumbered by mortgage or trust deed purchases only the vendor's equity of redemption, he is not personally liable to pay the encumbrance resting upon the land unless he expressly assumed and agreed to pay the same. If, however, he purchases land for its full value and retains in his hands, out of the consideration, a sufficient sum to satisfy the encumbrance, he may be held personally liable for the payment thereof, even though he has not expressly agreed to pay the encumbrance resting upon the land. (*Comstock v. Hitt*, *supra*; *Hammer v. Johnson*, 44 Ill. 192; *Fowler v.*

Fay, 62 id. 375; *Rapp v. Stoner*, *supra*; *Drury v. Holden*, 121 Ill. 130; *Consolidated Coal Co. v. Peers*, 166 id. 361; *Crawford v. Nimmons*, 180 id. 143.) We think it clear in this case the equity of redemption of the Harvey Lumber Company in said leasehold was all that was sold to its creditors and conveyed to defendant in error, and as defendant in error did not expressly agree to pay the encumbrance resting on the leasehold, he cannot be held personally liable to pay the balance due upon said notes and trust deed.

The further contention is made that at the time the taxes, ground rent, interest and \$5000 upon the first note were paid, in consideration of the extension of the time of payment of the balance due upon the notes and trust deed, the defendant in error agreed to pay said indebtedness. An arrangement for the extension was made by the attorneys of the Bankers' Land Association with the husband of plaintiff in error, who represented her. The defendant in error was not present at the time the contract for the extension of the time of payment was made, and he and the attorneys of the association concur in testifying that the attorneys who represented the association when such extension was obtained had no authority to represent the defendant in error. While there is ample evidence in the record that the time of payment of the balance of the notes was extended by the plaintiff in error, the evidence in the record does not show that the defendant in error ever agreed, in consideration of such extension, to pay the balance due upon said notes.

The question whether the same rule as to implied assumptions of indebtedness obtains in case of one taking title as trustee as would apply if he took title in his individual capacity has been discussed in the briefs. In the view we have taken of this case it has been unnecessary to consider that question.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

CHARLES F. WENHAM *et al.*

v.

THE INTERNATIONAL PACKING COMPANY.

Opinion filed December 22, 1904—Rehearing denied Feb. 9, 1905.

1. APPEALS AND ERRORS—*when trial court can do nothing but carry mandate into effect.* If the Appellate Court determines the issues and decides the questions involved upon their merits, and the case is reversed and remanded with directions to proceed in conformity with the views expressed in the opinion, the court below has no power except to enter final judgment without re-trial.

2. SAME—*what necessary in ascertaining whether the Appellate Court has decided the merits.* For the purpose of ascertaining whether the Appellate Court has determined the issues and decided the questions involved upon their merits, it is necessary to ascertain what the issues were and to examine the opinion of the court.

3. SAME—*when judgment of the Appellate Court is final.* Where the sole question whether the purchaser took anything by his purchase at a sheriff's sale is decided by the Appellate Court in the negative by holding that the motion to set aside the execution, levy, sale and certificate of purchase should have been allowed, there is nothing for the lower court to do, in carrying into effect the mandate of the Appellate Court to proceed in conformity with the views expressed in the opinion, but to allow the motion.

4. JUDGMENTS AND DECREES—*when an order of court amounts to restraint in issuing execution.* An order that a judgment by default stand as security and that leave be given to defendant to plead instantler, operates as a restraint upon the plaintiff's right to an execution, and the time he is so delayed is not counted in determining whether the one year's life of the lien of the judgment had expired before the execution was issued.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. MARCUS KAVANAGH, Judge, presiding.

On June 21, 1900, John Cichowicz brought an action on the case in the superior court of Cook county against the International Packing Company, the appellee, to recover damages for a personal injury. The defendant defaulted,

and on July 10, 1900, judgment was rendered by the court for \$5000 in favor of the plaintiff. Afterwards, on July 14, 1900, leave was given the defendant to plead *instanter*, on payment of \$100 to plaintiff's attorney and \$250 to plaintiff, the said sums to be deducted from any amount subsequently recovered. It was further provided in the order that "the judgment heretofore entered herein of record to stand as security." A trial, on December 24, 1901, resulted in a verdict for \$3000 in favor of the plaintiff, and after overruling motions for a new trial and in arrest of judgment, the court, on February 14, 1902, entered judgment against the defendant, which provided that "the judgment entered herein of record on the 10th day of July, A. D. 1900, for the sum of \$5000 stand in as full force and effect as at the time of the rendition thereof," and that such judgment be satisfied in full of record upon payment of \$2650 together with interest and costs of suit. The defendant prayed an appeal from that judgment to the Appellate Court for the First District, but the appeal was not perfected.

On March 20, 1902, the plaintiff caused an execution to be issued on this judgment, and a levy was made thereunder on certain real estate in the city of Chicago which had belonged to the defendant on July 10, 1900, but which had been sold and transferred to Isadore Schmitt, for an expressed consideration of \$75,000, by deed dated July 18, 1900, and recorded July 23, 1900. This real estate was sold by the sheriff, on July 15, 1902, under the execution and levy to Charles F. Wenham for \$2990, and on July 23, 1902, a certificate of sale therefor was issued by the sheriff to him. On the day of sale the sheriff paid to David K. Tone, plaintiff's attorney, \$2935 in full of the judgment and interest.

On July 1, 1902, after levy but before sale, a writ of error, which did not operate as a supersedeas, was sued out of the Appellate Court for the First District to the superior court by the International Packing Company, to review the judgment rendered against it, and on March 19, 1903, that

judgment was reversed, but the cause was not remanded. (*International Packing Co. v. Cichowicz*, 107 Ill. App. 234.) On May 4, 1903, the International Packing Company, pursuant to a written notice served upon David K. Tone, as the plaintiff's attorney and upon him individually, and upon Charles F. Wenham, presented to the superior court of Cook county its motion in writing for an order setting aside the execution, levy and sale and certificate of purchase above mentioned and requiring David K. Tone to pay to the clerk of the court for Charles F. Wenham or whoever may be entitled thereto the full amount of the bid made by Wenham at the sale. Defendant contended that the order of July 14, 1900, did not stay the judgment; that as no execution actually issued within a year after the date of the judgment, the lien was lost; and that as the deed to Schmitt conveyed all the title held by defendant, Wenham took nothing by the sale and certificate of purchase, and the relief sought by the motion should be awarded. The motion was accompanied by affidavits setting out the facts heretofore recited in this statement, and also averring that no execution was issued on the judgment within one year from July 10, 1900, and that plaintiff was not restrained by injunction, appeal or by the order of a judge or court, nor was he delayed on account of the death of the defendant from issuing execution on the judgment between July 10, 1900, and March 20, 1902. It is also stated in the affidavits, upon information and belief, that David K. Tone, on July 15, 1902, was claiming to be the owner of the judgment; that the \$2990, less costs of sale, was paid to him, and that he still holds in his possession and under his control the amount so paid to him by the sheriff.

At the hearing of the motion, David K. Tone appeared in court in his own behalf and for and on behalf of Cichowicz and Wenham, and objected to the jurisdiction of the court to enter any order affecting the rights of any of the parties. A hearing was had on the motion, appellee herein

introducing the documentary evidence of the proceedings in the cause and the affidavits hereinabove referred to, which was all the evidence heard on said motion, and the court thereupon entered an order overruling the motion of the defendant. The packing company appealed from that order to the Appellate Court for the First District, and that court, after stating, in its opinion, that the motion should have been allowed, reversed the order of the superior court and remanded the cause for further proceedings in conformity with that opinion. It also awarded costs against Cichowicz, Wenham and Tone. This appeal is prosecuted by the two last named persons to present for review the judgment of the Appellate Court.

It is here insisted that the Appellate Court erred in reversing the order of the superior court and remanding the cause, because the order of July 14, 1900, stayed execution until the entry of the judgment of February 14, 1902, and the execution, excluding the time between those dates, was issued within a year from the rendition of the judgment.

In the superior court the parties submitted propositions of law, and the action of that court in passing upon such propositions properly presents the question arising on the merits, which is discussed in the following opinion.

A preliminary question is brought to our attention by a motion made in this court by the appellee to dismiss this appeal on the ground that the judgment of the Appellate Court is not one from which an appeal lies.

THOMAS J. SUTHERLAND, for appellant Charles F. Wenham; DAVID K. TONE, *pro se*.

F. J. CANTY, and A. B. MELVILLE, for appellee.

Mr. JUSTICE SCOTT delivered the opinion of the court:

The order of the superior court was reversed by the Appellate Court and the cause was remanded. An appeal is prosecuted from the Appellate Court to this court on the

theory that the judgment of that court is "such that no further proceedings can be had in the court below except to carry into effect the mandate of the Appellate Court." The appellee moves to dismiss the appeal, and argues that the judgment of the Appellate Court does not fall within the language above quoted, which is from section 91 of chapter 110, Hurd's Revised Statutes of 1903. The judgment of the Appellate Court is that the order of the superior court be reversed "and that this cause be remanded to the superior court of Cook county for further proceedings in accordance with the views expressed in the opinion of this court." The opinion of that court contains these words: "Appellee Wenham took nothing by his purchase at the sheriff's sale, and the motion of the appellant should have been allowed." Any further proceedings in the superior court must have been in accord with that language had no appeal been prosecuted to this court.

Where a court of appellate jurisdiction, in considering a cause, determines the issues and decides the questions involved upon their merits, and the case is reversed and remanded with directions to proceed in conformity with the views expressed in the opinion, there is no power in the court below except to enter a final order or judgment without a re-trial; and for the purpose of ascertaining whether the appellate tribunal has determined the issues and decided the questions involved upon their merits, it is necessary to ascertain what the issues are and to examine the opinion of the court which deals therewith. *In re Estate of Maher*, 210 Ill. 160.

In this case, the sole question is whether Wenham took anything by his purchase at the sheriff's sale. The Appellate Court determined that question on its merits adversely to appellant, holding that the motion made in the superior court by the International Packing Company, which is appellee here, should have been allowed. Had the case gone back to the superior court in accordance with the judgment of the

Appellate Court, it is manifest that the superior court could have done nothing but carry into effect the mandate of the Appellate Court by allowing the motion of the packing company, appellee here.

The motion to dismiss the appeal will be denied.

Section 1 of chapter 77, Hurd's Revised Statutes of 1903, provides that a judgment of a court of record shall be a lien on the real estate of the defendant within the county for a period of seven years, but that if execution is not issued thereon within one year from the time the same becomes a lien, it shall cease to be a lien after the expiration of that year. Section 2 of the same chapter is in words and figures following:

"When the party in whose favor a judgment is rendered is restrained, by injunction out of chancery, or by appeal, or by the order of a judge or court, or is delayed, on account of the death of the defendant, either from issuing execution or selling thereon, the time he is so restrained or delayed shall not be considered as any part of the time mentioned in sections 1 or 6 of this act."

The question here is whether Cichowicz was restrained by the order of the court by which appellee was permitted to plead. That order was entered on July 14, 1900, and so far as material was as follows: "Now, on this day it is ordered that leave be and is hereby given the defendant to plead herein instanter, and the judgment heretofore entered herein of record to stand as security."

In *Hier v. Kaufman*, 134 Ill. 215, a similar order had evidently been made in reference to a judgment by confession, and this court there said that a court of law exercises an equitable jurisdiction over a judgment by confession and may open the judgment and allow the debtor to present his defense, but will protect the creditor "by permitting the judgment to stand as security; in such cases, the proceedings on the judgment are merely stayed; the enforcement of the plaintiff's lien is suspended, but the lien is fully pre-

served; if the defense is successful, the judgment falls; if otherwise, the judgment is to be enforced." While the question involved in that case was not the same as the one now before us, we are of the opinion that the language quoted is an accurate statement of the law applicable here.

The order is, that the judgment is to stand as security, which, we think, means that it is to stand or exist for no other purpose. The object of the entire order is to permit the defendant to present his defense, saving, however, to the plaintiff all rights acquired by the judgment in case the defense is without merit. If after the making of this order the plaintiff could have proceeded to enforce the judgment by execution, it is manifest that the right of the defendant to plead might be of no avail whatever, because even if it were successful on the trial of the issue formed by its plea, the plaintiff might have collected the original judgment and put the proceeds beyond the reach of the defendant long before the determination of the issue raised by the plea.

The order under consideration operated to restrain the plaintiff from the date of its entry, July 14, 1900, until the date of the judgment entered in pursuance of the verdict, which was February 14, 1902. Excluding this period, the execution was issued within a year from the time the original judgment became a lien.

Our view of this matter is supported by the following authorities: 6 Ency. of Pl. & Pr. 221, 222; *Ford v. Whitridge*, 9 Abb. Pr. 416; *Rodbourn v. U., I. & E. R. R. Co.* 28 Hun, 369; *MacDougall v. Hoes*, 58 N. Y. Supp. 209.

It is urged that the sale under the execution should be set aside because the real estate was sold *en masse* for a sum so much less than the value of the property as to be grossly inadequate. The property consisted of two lots. It appears by the sheriff's return that they were offered separately, and no bids being received on either, they were then offered together and sold to Wenham; but it is said that Wenham's bid upon which the sale was made was not a reasonable one in

amount because it was very much less than the value of the property, and that the sheriff should have refused to accept the bid and continued the sale. There is in this record no evidence whatever of the value of the property on the day of the sale under execution, and this question for this reason does not arise on this record.

The judgment of the Appellate Court will be reversed and the order of the superior court will be affirmed.

Judgment reversed.

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d215 500

JAMES G. EVANS

v.

EFFIE W. WOODSWORTH *et al.*

Opinion filed December 22, 1904—Rehearing denied Feb. 9, 1905.

1. REVIEW—*a decree will not be set aside upon ground of false evidence.* A court of equity will not set aside a decree upon the ground it was obtained by false evidence, but only for fraud which gives the court colorable jurisdiction over the defense presented.

2. LACHES—*when a party is guilty of laches in applying to set aside decree.* Unexplained delay by the defendant in a divorce suit in waiting until his wife was dead and the rights of third parties had intervened before seeking to set aside the decree for alleged fraud in procuring the decree, of which he had knowledge at the time, constitutes *laches*.

3. SAME—*defense of laches need not be set up by answer if apparent from bill.* The defense of *laches* need not be set up by way of answer to a bill in equity if the *laches* is apparent on the face of the bill.

4. SAME—*what constitutes laches is a matter of discretion with court.* What constitutes *laches* in a given case depends upon the discretion of the court, and unless such discretion has been abused it will not be interfered with by a court of review.

5. RES JUDICATA—*former adjudication must be pleaded.* A former adjudication can only be availed of by being alleged in the bill or set up by way of plea or answer.

6. SAME—*when question of former adjudication cannot be determined.* Whether a decree dismissing a bill for divorce was a bar

to a subsequent decree by another court granting the divorce can not be determined by a court of review in the absence of the testimony upon which the bill was dismissed or upon which the subsequent decree was granted.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. E. W. BURKE, Judge, presiding.

D. H. STAPP, and JOHN M. HESS, (A. N. WATERMAN, of counsel,) for appellant.

WHARTON PLUMMER, and GEORGE W. PLUMMER, for appellees.

Mr. JUSTICE WILKIN delivered the opinion of the court:

On March 20, 1893, Isabella G. Evans filed her bill for divorce in the superior court of Cook county against her husband, James G. Evans, on the ground of desertion and extreme and repeated cruelty. She also then filed her affidavit that the defendant was a non-resident of this State and that his place of residence was unknown to her and upon diligent inquiry could not be ascertained. Service was obtained by publication, and on May 13, 1893, upon a hearing, as is claimed by the appellant, that bill was dismissed without costs. On September 27, 1893, she filed a second bill for divorce in the circuit court of that county, which was substantially, if not literally, a copy of the bill previously filed except as to the title of the court, and she then filed her affidavit of his non-residence substantially as in the former case, except that it stated that his last known place of residence was San Francisco, California, and upon that affidavit notice of publication was duly made. On December 11, 1893, upon the defendant's default and a hearing, she obtained a decree as prayed. On August 10, 1894, she died seized of certain real estate, which by her last will she devised to her sister, Effie W. Woodsworth, for life, with remainder to

the two infant daughters of said sister. Her will was duly admitted to probate February 13, 1895, and Mrs. Woodsworth appointed administratrix with the will annexed. On June 4, 1896, more than two and a half years after the decree of divorce had been rendered, the husband, James G. Evans, filed this bill, making the appellees defendants, in which he alleged that the affidavits of non-residence filed by his wife in the superior court, and also in the circuit court, were falsely and fraudulently made, for the purpose of imposing upon the court and to give it apparent and colorable jurisdiction; that the decree of divorce was fraudulent and void, being procured by the deception practiced upon said court, and that the same is a cloud upon his interest in any estate left by his said wife; that the desertion and cruelty charged in the bill for divorce were false. The prayer of the bill was that the decree of divorce be set aside and annulled. The adult defendants filed their joint and several answer denying each material allegation of the bill, and, in effect, pleading *laches* on the part of the complainant. The guardian *ad litem* appointed for the infant defendants filed his answer, denying, generally, the averments of the bill. The cause was heard in open court on oral and documentary evidence and decided against the complainant. He thereupon asked leave to amend his bill so as to make it conform to his proofs. That motion was not then disposed of, but the cause was referred to a master to examine the testimony and report to the court whether the amendment conformed thereto. The master subsequently made his report, in which he found that the allegations of complainant's amended bill was not supported by the evidence, reporting upon the whole cause adversely to the complainant. To his report objections were filed and overruled. Exceptions were then heard by a judge other than the one who first heard the cause, and overruled, the report approved and the motion to amend the bill so as to conform to the testimony denied. On June 15, 1903, the case came on for final hearing before the chancellor who first

heard the testimony, and he dismissed the amended bill for want of equity. After the filing of the record in the Appellate Court a third chancellor ordered the record to be so amended as to show that the proposed amendment was presented November 2, 1903, *nunc pro tunc* as of November 8, 1897. The Appellate Court for the First District having affirmed the decree of the circuit court, this appeal is prosecuted.

It is insisted by the appellant that his wife was guilty of fraud in making the affidavit of his non-residence on each of the bills for divorce, which she knew to be false, and in procuring the decree in the circuit court against him for desertion when she knew there was no basis for such charge; also, that the decree of the superior court, under the bill there filed, is *res judicata*, and therefore the decree of the circuit court sought to be set aside by this bill should be held absolutely void.

The evidence introduced upon the hearing upon the allegations of fraud as to the affidavits of non-residence was in irreconcilable conflict. There is evidence in the record tending to prove that the wife knew that her husband was not a non-resident of Illinois, but there is also much testimony to the contrary. As to the desertion, it does clearly appear that for a long time prior to the filing of the first bill, and continuing up to the time the decree was rendered in the circuit court, the complainant lived separate and apart from his wife, coming and going from the city of Chicago, where she lived, from time to time, without going to her place of residence and without having any communication with her whatever. Courts of equity will not, however, set aside a decree upon the ground that it was obtained by false evidence, but only for fraud which gives a court colorable jurisdiction over the defense presented. (*Burton v. Perry*, 146 Ill. 71, citing *Caswell v. Caswell*, 120 id. 377.) As in all other cases where fraud is alleged, the proof must be clear and satisfactory. From our consideration of all the testi-

mony in this record we cannot say that the conclusion of the master and chancellor, that the allegations of the bill as to fraud in obtaining jurisdiction of the court in which the decree of divorce was rendered were not sustained by the proofs, was erroneous. Moreover, this case falls within the rule that where the chancellor has heard the witnesses in open court we will not disturb his findings unless they are clearly and manifestly against the weight of the testimony.

There is, however, a further consideration which must lead to an affirmance of the decree of the circuit court and the judgment of the Appellate Court. The complainant's conduct toward his wife from the time he married her, on May 31, 1884, until their separation, as shown by the uncontradicted testimony, seems to have been wholly without excuse or justification. As early as October, 1893, he knew that she was taking steps to secure a divorce from him on the ground of desertion and had actual notice of the bringing of the suit in the circuit court, but took no steps whatever to prevent her from obtaining the decree. He admits that in February, 1894, he knew that the decree had been rendered, and if it had been procured by fraud, as he now claims, he then knew of such fraudulent conduct,—at least knowledge as to the affidavits of non-residence and the grounds upon which the divorce was claimed, was open to him through the records of the circuit court of Cook county. Under these circumstances it was manifestly his duty, if he intended to seek to have the decree vacated and set aside, to act promptly. Instead of doing so he took no steps in that direction until after the lips of his wife had been closed by her death and the rights of third parties had intervened. No sufficient explanation is shown for this delay. The contention that the defense was not available under the answers is without force. Certainly this position could not be maintained as against the infants who answer by their guardian *ad litem*. We think the answer of the adults also substantially set up the defense of *laches*. But it is not necessary to set up that defense by way

of an answer to a bill in equity where the *laches* is apparent on the face of the bill, as we think it is here. (*Lloyd v. Kirkwood*, 112 Ill. 329.) "Where a party has slept upon his rights and acquiesced in what has been done, equity will not afford its aid in enforcing his demands." (*Vermilion County Children's Home v. Varner*, 192 Ill. 594.) What will constitute *laches* in a given case depends upon the discretion of the court, and unless that discretion is abused it will not be interfered with. Here we think the chancellor might very properly have placed his decision upon that ground alone.

We do not regard the question of *res judicata* as presented by this record for our decision. It is a familiar rule that former adjudication can only be availed of by being alleged in the bill or set up by way of plea or answer, and in the present case no such defense was interposed. It is true, the complainant attempted to set it up in his amended bill, which he claimed was necessary in order to conform to the testimony; but leave to file that amendment was denied, and no error has been assigned upon the ruling of the court in that regard. If, however, the question were here open to discussion, it is too clear for argument that in the absence of the testimony upon which the bill in the superior court was dismissed and that upon which the decree in the circuit court was rendered it is impossible to tell whether the one was a bar to the other or not. The bill in the superior court, as suggested by the Appellate Court, may have been dismissed because the proof of desertion was not sufficient because of the lapse of time between the abandonment and the filing of the bill. At all events, there is nothing here to show that that bill and decree were a bar to the decree rendered by the circuit court.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

HENRY H. GAGE

v.

THE PEOPLE *ex rel.* John J. Hanberg, County Treasurer.*Opinion filed December 22, 1904—Rehearing denied Feb. 9, 1905.*

1. SPECIAL ASSESSMENTS—*applications for sale for different installments are independent proceedings.* Objections to the legality of judgments of sale for earlier installments of a special assessment cannot be considered upon application for judgment of sale for a subsequent installment, since the proceedings are independent.

2. SAME—*certificate of publication construed.* In a certificate of publication reciting that the foregoing list is a "list of delinquent lands and lots" upon which special assessments remain due and unpaid, "with notices hereto attached, and that the same were duly published and advertised," the words "the same" refer to and include all lists and notices mentioned in the certificate. (*McChesney v. People*, 174 Ill. 46, distinguished.)

3. SAME—*form of judgment prescribed by section 191 of Revenue act must be followed.* The form prescribed by section 191 of the Revenue act for a judgment and order of sale for delinquent taxes and special assessment must not be departed from in any material respect.

4. SAME—*judgment of sale must show amount due.* A judgment for the sale of lots for a delinquent special assessment is fatally defective which fails to show, in terms or by proper reference, the amount of assessment and costs adjudged against the property.

5. SAME—*defect in the form of judgment does not require new trial.* If a defect in the form of the judgment entered on application for judgment of sale for a delinquent special assessment is the only error in the proceeding a new trial will not be awarded, but the judgment will be reversed, with directions to the trial court to enter a proper judgment.

WRIT OF ERROR to the County Court of Cook county;
the Hon. ORRIN N. CARTER, Judge, presiding.

On July 11, 1904, the county collector of Cook county applied to the county court of that county for judgment for the delinquent fourth installment of a special assessment levied against certain lots in the city of Chicago belonging to

Henry H. Gage. On July 13, 1904, Gage filed a written special appearance, questioning the jurisdiction of the court to entertain the application or to enter judgment or order of sale or to permit the sale of said lots, and objected to the consideration of the application by the court for the following alleged reasons: First, because the notice for the sale of said lots to pay the first, second and third installments of said assessment, upon which installments judgment and order of sale had been entered by said county court at a previous term, was defective; second, because there is a variance between the warrant for the collection of the assessment and the said notice of sale as to the subject matter of the delinquency; and, third, because the certificate of publication of the notice of application for judgment for the said fourth installment, and the notice of sale for the first three installments, does not conform to the statute and is ambiguous and informal.

The court ordered that the special appearance of Gage, in so far as it affected the first three installments, be stricken from the files, and overruled all objections as to the fourth installment and entered judgment against the property.

Gage sued out a writ of error from this court to review the judgment of the county court, and assigns as error that the judgment is defective in failing to show the amount or amounts for which rendered. He also urges that the court erred in ordering the objections relating to the first three installments stricken from the files, and in holding the certificate of publication of the notice of application for judgment to be sufficient.

F. W. BECKER, for plaintiff in error.

WILLIAM M. PINDELL, (EDGAR BRONSON TOLMAN, Corporation Counsel, and ROBERT REDFIELD, of counsel,) for defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

This was an application for a judgment and order of sale for the payment of a delinquent fourth installment of a special assessment. At a former term of the same court, judgment and order of sale had been entered for the first three installments of the same special assessment. In this proceeding plaintiff in error sought to question the validity of the judgment for the earlier installments. That this is an independent proceeding, in which the court could not consider any question affecting the legality of the earlier judgment, is too plain to require argument or the citation of authorities.

The appearance entered by plaintiff in error was special in character, and it was urged that the certificate of publication was defective. That certificate recites that the foregoing lists of lands and lots "is a list of delinquent lands and lots upon which" taxes remain due and unpaid, "and also a list of delinquent lands and lots" upon which special assessments and special taxes remain due and unpaid, "with notices hereto attached, and that the same were duly published and advertised," etc. It is said that this certificate is unintelligible because it is impossible to say what is the antecedent of the words, "the same," where they appear before "were duly published and advertised." We think the objection without merit. The words, "the same," plainly apply to and include all the lists and the notices which had been mentioned in the preceding portion of the certificate.

This case is distinguishable from the case of *McChesney v. People*, 174 Ill. 46, in that the words "and that the same," which appear between the word "attached" and the word "were" did not appear in the certificate in that case at all.

The judgment in this cause reads as follows:

"It is thereupon ordered by the court that judgment be and is hereby entered against the tract or tracts, or lots of land or parts of tract or tracts or lots as described in the objections filed herein, and as set forth in the attached schedule

which is made a part of this order, in favor of the People of the State of Illinois, for the sums annexed to each, being the amount of the said special assessment and costs due severally thereon. And it is ordered by the court that said several tract or tracts or lots of land be sold as the law directs to satisfy the amount of said assessment and costs annexed to them severally."

It appears from the abstract that this judgment is followed by a schedule giving a description of the lots against which the judgment was to be rendered, but in that schedule there is no statement showing the amount of the assessment and costs. It cannot be ascertained what amounts are adjudged against the property. The judgment therefore is fatally defective. As pointed out in *Gage v. People*, 207 Ill. 61, the form prescribed by section 191 of chapter 120, Hurd's Revised Statutes of 1903, for this judgment must be substantially followed, and in that case we indicated the precise method to be pursued in entering such a judgment. That form contemplates a reference in this judgment to a list which precedes it in the "judgment, sale and redemption record" of the county court, and that list shows or should show the amount of the judgment against each tract. It appears in this case that the judgment follows such a list, but instead of referring to that list by the use of the word "aforesaid," as contemplated by the form used in the statute, reference is made, as appears from the abstract, to a schedule attached to and following the judgment, and that schedule, as we have above pointed out, does not show the amount for which the judgment was entered. Had it shown that amount there would have been a substantial compliance with the statute in that regard. A comparison of the judgment with the statute shows that it does not follow that enactment in other respects. As this judgment must be reversed, the difficulties attendant upon such other variances may be obviated when the application is again brought to the attention of the court below.

No error intervened in this proceeding prior to the entry of the judgment. It is therefore unnecessary to award a new trial.

The judgment of the county court, however, will be reversed, and the cause remanded with directions to that court, upon motion of defendant in error, to enter a judgment in compliance with section 191 of chapter 120, Hurd's Revised Statutes of 1903.

Reversed and remanded, with directions.

ADELAIDE STRAYER *et al.*

v.

LEODICY DICKERSON.

Opinion filed December 22, 1904—Rehearing denied Feb. 9, 1905.

1. APPEALS AND ERRORS—*when alleged error as to master's findings cannot be considered.* Alleged errors based upon the contention that the master's report, which was confirmed by the court, found the facts respecting certain matters against the weight of the evidence cannot be considered on appeal, where no objections or exceptions to the report appear in the record or the abstract.

2. SAME—*when master's finding that a party is estopped by contract cannot be considered.* A finding by the master that a party is estopped by contract cannot be disturbed on appeal, in the absence of objections and exceptions to his report in that respect, where the original contract was destroyed and the evidence is conflicting as to whether the copy produced in evidence is a true copy of original.

APPEAL from the Circuit Court of McLean county; the Hon. COLSTIN D. MYERS, Judge, presiding.

THOMAS W. TIPTON, OWEN & OWEN, and BARRY & MORRISSEY, for appellants.

CHARLES L. CAPEN, for appellee.

Mr. CHIEF JUSTICE RICKS delivered the opinion of the court:

This is an appeal from a decree of the circuit court of McLean county correcting the description of land in a deed to appellee from her late husband, Henry C. Dickerson. In 1892 the husband was seized in fee of the west half of the north-east quarter of section 29, the west half of the south-east quarter of section 20 and the south-west quarter of the north-east quarter of section 20, all in town 22, range 4, east. The land constituted one farm, and was one and a quarter miles in length from south to north. The south eighty, lying in section 29, was for many years the family homestead and had upon it the buildings and principal improvements. Dickerson also had another tract of land in section 31 of the same town, and some town lots in Leroy. He made the deed in question on July 20, 1892, placed it of record and delivered it to the appellee. It is alleged that by mutual mistake the deed describes the west half of the south-east quarter of section 20 aforesaid, when the intention was to convey and receive the west half of the north-east quarter of section 29, called the homestead tract.

The case was before us on a former decree granting the same relief, and was reversed upon the facts then in the record upon the grounds that the conveyance was without consideration, and was merely a voluntary one,—a gift *inter vivos*; that it was not executed because of the mistake in description and was a mere contract to convey, and that a court of equity would not decree specific performance of such contract; that it also appeared from the evidence that the property was the homestead at the time of the conveyance, and as the wife did not join in the conveyance and release the homestead estate, the evidence should show, but failed to do so, that the homestead had been adandoned by the husband for the express purpose of giving effect to the conveyance. (205 Ill. 257.) The cause was remanded generally, and the bill was amended, alleging more specifically the passing of a

valuable consideration from appellee to her husband for the conveyance; that the place had not been occupied as a homestead since 1885; that appellee took possession immediately upon the conveyance being made, has ever since had possession and on the faith of the conveyance made valuable and permanent improvements.

Henry C. Dickerson, the grantor, at the time of the conveyance had five daughters, who were his only living children and only prospective heirs. Three of the daughters were Elizabeth Hobart, Adelaide Strayer and Cordelia Patterson, who were married at the time of the conveyance, and to the first two of whom he had advanced property which he regarded equivalent to their share of his estate, as he so states in his will executed near that time. In 1898 he conveyed by deed, in which his wife joined, to his daughters Georgia Belle and Rosaline the land above described in sections 20 and 31. In this conveyance was the same land described in the deed to appellee. He died on May 20, 1899, and by his will made what purported to be a general disposition of his property, but the only real estate mentioned in his will was a tract not in question, which he charged with certain expenditures, and his town property in Leroy. The tract in question was not mentioned or in any manner referred to, and we are satisfied from the evidence that up to the time of his death he thought he had conveyed to the appellee the land she claims. The five daughters named were made defendants to the original bill, and pending the suit the daughter Rosaline died intestate, and left a daughter, Fannie Dickerson, her only heir, who has been substituted as a defendant. All the defendants are adults.

At the first hearing all of the defendants but Adelaide Strayer defaulted and she alone prosecuted the first appeal. At the term that the first decree was entered, appellant Cordelia Patterson entered her appearance in writing, sworn to by her husband, which was as follows: "I, Cordelia Patterson, hereby enter my appearance in the above cause, to have

the same force and effect as if served with process more than ten days before the first day of the present term, and I hereby consent that a decree may be taken at any time, at this or any succeeding term, as prayed for in said bill." When the cause was remanded the bill was amended but the prayer was not changed. The amendments made the allegations of the former bill more clear and specific. Mrs. Patterson answered substantially the same as Mrs. Strayer, both denying the allegations of the bill and the right to relief. The other defendants defaulted. Replication was filed and the cause was referred to the master to report evidence and conclusions. The record states that objections were filed to the report and by the master overruled, and were re-filed in the court as exceptions to said report and overruled by the court, but no objections or exceptions are found in the record or abstract.

After finding the jurisdictional facts and that the court has jurisdiction of the parties and the subject matter of the suit, the master finds that appellant Cordelia Patterson was a party defendant to the original decree from which the former appeal was prosecuted by appellant Strayer; that the interests of Cordelia Patterson and appellant Strayer are separable, and that appellant Patterson is concluded by the former decree, to which she was a party, granting the same relief now prayed for and granted in this decree and from which she did not appeal. The master further found that the appellant Adelaide Strayer, after the death of her father, entered into a written contract with appellee, upon a sufficient consideration, to not interfere with the estate of Henry C. Dickerson, nor with any of the transfers, or any part thereof, in any manner or form, or make any objections or question to the deed of appellee to the "home place," which agreement was set up in the bill and the master finds was established by the proof, and that the appellant Strayer is estopped and bound thereby. After passing upon the competency of certain witnesses the master proceeds to the consideration of the case upon its general merits, and finds that

there was a good and valuable consideration for the conveyance to the appellee from her husband, which consisted of moneys received by him from her from the year 1861 down to the time of making the deed, in 1892. He finds further that her said husband recognized such indebtedness and promised to re-pay the same by conveying to appellee any eighty acres of land which he had that she might select, and specifically finds that from July of the year 1874 to the making of the deed appellee advanced and loaned to her husband, each year, money in various amounts; that the moneys so advanced to him were loans, and not gifts, and were so recognized by him; that in payment of the sums so due her, appellee elected to have conveyed to her the "home place," and that in attempting to do so an error was made in the description; that appellee, at the time of the conveyance, assumed control and possession of the premises intended to be conveyed and made thereon valuable improvements and paid the taxes and insurance, and that she is entitled to have the tract so purchased conveyed to her. He further finds that the property in question was not, at the time of the conveyance, the homestead of the grantor and his family, but that the same had been abandoned as a homestead twenty years prior to the making of the conveyance and a new homestead was acquired prior to said conveyance, and recommends a decree in accordance with the prayer of the bill. The decree is based upon and follows the report of the master, finding each of the material facts specifically and setting the same forth in the decree.

Appellants, in their brief and argument and by the errors assigned, urge that the master admitted improper evidence, and particularly that he permitted appellee, the complainant below, to testify in her own behalf, and permitted her daughter, Georgia Belle Dickerson, and her grand-daughter, Fannie Dickerson, who were defendants to the bill, to testify in behalf of appellee; that the court erred in holding that appellant Patterson was concluded or estopped by the former

decree, that appellant Strayer was bound by her contract in such a manner as affected the rights of the parties in this litigation, and that the decree was contrary to the evidence.

It is not contended that the bill does not state a cause of action, nor is it contended that there is not competent evidence in the record tending to support the allegations of the bill, the former of which questions could probably be raised in this court without the record containing the objections to the master's report and the exceptions heard by the chancellor, but as to questions depending upon the weight of the evidence we are unable to see how we can consider them in the absence of the objections and exceptions to the master's report. It is held that the objections as to the conclusions of the master upon questions of fact are in the nature of special demurrers to the evidence, and that they must be presented to the master and should point out the grounds of objection with reasonable certainty, and that the exceptions filed in the court upon the coming in of the report should correspond with the objections made before the master and be confined to such objections as were allowed or overruled by the master. (*Springer v. Kroeschell*, 161 Ill. 358; *Hurd v. Goodrich*, 59 id. 450; *Moffett v. Hanner*, 154 id. 649.) When this is done, the errors assigned on appeal that relate to matters that were considered by the master, and particularly so as to matters of fact and matters relating to the admission and exclusion of evidence, are predicated upon the action of the court in overruling or sustaining the exceptions to the report of the master, (*Whalen v. Stephens*, 193 Ill. 121,) and unless the questions are made by the objections and exceptions to the master's report they cannot be considered by this court, though error be assigned. (*Prince v. Cutler*, 69 Ill. 267; *Pennell v. Lamar Ins. Co.* 73 id. 303; *Jewell v. Rock River Paper Co.* 101 id. 57; 14 Am. & Eng. Ency. of Law,—2d ed.—944.) To this rule there is the exception that where, on appeal, the findings by the master of the facts are not questioned but the conclusion of the master upon the facts

so found is questioned, that may be done without making or preserving in the record the objections and exceptions to his report. It is equivalent to a general demurrer to the evidence. (*VonTobel v. Ostrander*, 158 Ill. 499; *Hurd v. Goodrich*, 59 id. 450.) The case at bar does not come within this exception, as the contention is that the master found the facts contrary to the weight of the evidence.

It may be that the question as to the effect of the former decree upon the appellant Patterson, as a matter of estoppel, would fall within the exception last stated, but the finding of the master as to the contract between Strayer and appellee, by which it is found that Strayer had agreed not to interfere with the conveyance to appellee of the home place, could not fall within this exception, because the evidence showed that the original writing was lost or destroyed by fire; and whether the writing containing the writing, or the supposed copy thereof which was introduced in evidence, was the same as the original writing between the parties, was a controverted question of fact, and as the record stands it is not so presented that we are authorized to enter upon a consideration of it. In our view of the finding of the master that there was a valuable consideration for the conveyance, and that appellee took actual possession of the premises and made valuable and permanent improvements upon the same and held the same from the time of the conveyance hitherto, the consideration of the effect of the former decree upon appellant Patterson could have no effect upon the final action of this court, as, if we should find that the master and court erred in that conclusion, we would still be bound to hold that the decree, upon the general facts, could not be disturbed.

The absence from the record of the objections and exceptions to the master's report must have the same effect as though neither had been made. Under the findings here, and where the rights of creditors are not involved, we feel impelled to hold them sufficient to support the decree, and it will accordingly be affirmed.

Decree affirmed.

THE PEOPLE OF THE STATE OF ILLINOIS

v.

WILLIAM E. WAITE *et al.*

Opinion filed December 22, 1904—Rehearing denied Feb. 8, 1905.

QUO WARRANTO—*when a judgment cannot be set aside on quo warranto.* If the county court had jurisdiction of the parties and subject matter in entering a judgment organizing a drainage district, the judgment, even though erroneous, cannot be set aside by a proceeding in the nature of *quo warranto*.

WRIT OF ERROR to the Circuit Court of Edgar county;
the Hon. E. R. KIMBROUGH, Judge, presiding.

This was a petition filed in the circuit court of Edgar county by the State's attorney of that county, asking leave to file an information in the nature of a *quo warranto* to test the legality of the organization of the Polecat Drainage District, composed of lands situated in Coles and Edgar counties and organized under the provisions of the Levee act in the county court of Coles county. The court declined to permit the information to be filed, and a writ of error has been sued out from this court to review the action of the court in that regard.

Three reasons are assigned why said information should have been allowed to be filed: First, that the record of the county court of Coles county does not show that the petition upon which the county court acted at the time the district was organized was signed by a majority of the adult land owners of the district; second, that no final judgment was entered by the county court finding said drainage district duly established, as provided by law; and thirdly, that the petition upon which the county court acted at the time the district was organized was not signed by a majority of the adult land owners of the drainage district.

JOHN W. MURPHY, State's Attorney, (J. E. DYAS, H. A. NEAL, and F. K. DUNN, of counsel,) for plaintiff in error.

A. C. ANDERSON, and E. C. & J. W. CRAIG, for defendants in error.

Mr. JUSTICE HAND delivered the opinion of the court:

The legislature, by the act under which said drainage district was organized, committed to the county courts of this State jurisdiction to organize into drainage districts lands similarly situated to the lands lying within the territory comprising that organized into the Polecat district. If the judgment of the county court of Coles county organizing said district was valid,—in other words, if the court had jurisdiction of the subject matter and of the parties at the time it rendered the judgment whereby said district was organized,—its judgment organizing the district could only be attacked by a direct proceeding,—that is, by appeal or writ of error,—and could not be set aside and annulled by a proceeding in the nature of a *quo warranto*, as it is not the office of that proceeding to operate as a writ of error or by way of an appeal to review the final judgment of a court of record in a case wherein that court had jurisdiction of the parties and the subject matter of the litigation and has rendered a judgment disposing of the matter pending before it upon the merits, although error may have intervened in the entering of the judgment.

In *People v. Commissioners of Mineral Marsh Drainage District*, 193 Ill. 428, the State's attorney of Bureau county sought leave to file an information in the nature of a *quo warranto* to test the legality of the organization of a drainage district by the county court of that county, on the ground that certain lands had been improperly included within the boundaries of the district and which would derive no benefit from the system of drainage provided for by the drainage district. It was there held that it was within the province of

the county court to determine what lands would be benefited by the proposed system of drainage and therefore might properly be included within the boundaries of the district, and that the county court having determined that question, its judgment could not be reviewed by a proceeding in the nature of a *quo warranto*. In the case at bar the petition provided by the statute was filed in the county court of Coles county and the statutory notice to all persons interested was given. That county court then had jurisdiction of the subject matter and of the parties and was authorized to act. If it erred in holding that the petition was signed by the requisite number of adult land owners of the district or in refusing to permit persons who had signed the petition for the organization of the district to withdraw their names from the petition, the remedy of the parties in interest who deemed themselves aggrieved by the decision of the court was to have the case reviewed upon appeal or by writ of error, and not by a *quo warranto* proceeding.

The contention is made that the judgment of the county court does not find that the petition for the organization of the drainage district was signed by the requisite number of adult land owners and that the district was duly organized as provided by law. While the record is somewhat indefinite, when taken as a whole we think it shows the county court of Coles county found that the requisite number of adult land owners did sign the petition and that the district was duly organized. While in a court of review the contention of the plaintiff in error as to the invalidity of the judgment by reason of its indefiniteness might perhaps merit some consideration, such contention cannot be made here as a basis upon which to predicate *quo warranto* proceedings with a view to ultimately overturn the judgment of the said county court.

We have disposed of this case upon its merits, as the question of a want of jurisdiction to review this record in this court has not been raised, and a like record was reviewed by this court without objection in *People v. Commissioners of*

Mineral Marsh Drainage District, supra. It may, however, be argued, with much force, that this record involves only a question of practice,—that is, the right to file an information in the nature of a *quo warranto*,—and not a franchise, which would have been involved in a hearing upon the information if filed, and that the case should have gone to the Appellate Court in the first instance instead of to this court.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

A. J. EUSTACE *et al.*

v.

THE PEOPLE *ex rel.* John J. Hanberg, County Treasurer.

Opinion filed December 22, 1904—Rehearing denied Feb. 9, 1905.

1. SPECIAL ASSESSMENTS—*when an improvement is substantially different from the one authorized.* A pavement which at certain street intersections is greatly variant from the grade as fixed by the ordinance, the difference being occasioned by the presence of viaducts which it is claimed the city council overlooked, is substantially different from the one authorized by the ordinance.

2. SAME—*city cannot let contracts for improvement not authorized by ordinance.* If a pavement cannot be constructed as provided for in the ordinance without destroying the usefulness of the street it is the duty of the city council to repeal the ordinance; and it can not construct a different improvement and compel property owners to pay assessments therefor upon the ground that the improvement constructed was more beneficial than the one authorized.

3. REHEARINGS—*can only be asked on case as first made.* An additional record placed on the files by the appellee after appellant had filed his abstract and brief, which record was not abstracted or in any way called to the court's attention on the hearing, will not be considered by the court upon petition for rehearing.

APPEAL from the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

GEORGE W. WILBUR, for appellants.

WILLIAM M. PINDELL, (EDGAR BRONSON TOLMAN, Corporation Counsel, and ROBERT REDFIELD, of counsel,) for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This was an application by the appellee treasurer for judgment and order of sale of certain lots and tracts of real estate belonging to the appellants, for an alleged unpaid first installment of a special assessment levied under an ordinance of the city of Chicago providing for the curbing, grading and paving of South Canal street from the south line of West Harrison street to Lumber street, in said city. The appellants interposed a number of objections to the application, but the only objection necessary to be considered is, that the improvement as constructed is other and different than the improvement provided to be constructed by the ordinance.

The ordinance provided that South Canal street should be so graded that the surface of the pavement of the finished roadway should coincide with the grade of said Canal street, which grade the ordinance established at the various street intersections, among others as follows: At the south line of West Harrison street 14.0 feet above city datum; at the intersection of said South Canal street and West Polk street, 14.6 feet above city datum. The surface of the roadway as constructed is 20.32 feet above city datum at the south line of West Harrison street, being 6.32 feet above the grade as fixed by the ordinance, and the surface of the roadway of the street as constructed at the intersection of West Polk street is 22.67 feet above city datum, being 9.07 feet higher than provided in the ordinance. There is a viaduct at West Harrison street, and also a like structure at West Polk street, and it appears from the testimony that the roadway was constructed at a greater height at each of the points, and along the approaches thereto, than provided in the ordinance, because of these viaducts.

The total of the assessments for which judgment of confirmation was entered was \$55,500, but the total cost of the work as completed was shown to be \$71,509.29, being \$16,009.29 in excess of the total amount for which judgments of confirmation were entered. This large increase in the cost of the improvement was occasioned in the greater part by the construction of the grading of the street in an entirely different manner from that authorized by the ordinance.

Counsel for the city say, that when the ordinance was adopted the existence of the viaducts at West Harrison and West Polk streets was overlooked and not taken into consideration by the city council, and say the presumption must unquestionably be indulged that a clerical error was made in establishing the grades at these points several feet below the grade of the viaducts. The position that the city council overlooked and did not take into consideration the viaducts is entirely inconsistent with the suggestion that the heights named in the ordinance at the points where the viaducts are situate were merely clerical errors. But however this may be, the improvement which has been constructed is materially and substantially different from that which the ordinance authorized to be made. The departure from the ordinance is material and substantial in two respects: It increases the grade of the streets at the south line of West Harrison street 6.32 feet, and also increases the grade of that street from that point southward to the point of the beginning of the approach to that viaduct; it increases the grade at the center of the intersection of South Canal street and West Polk street 9.07 feet, and also increases the grade from that point to the north and south to the beginning of the approaches from each direction. The improvement as completed is substantially different from that authorized by the ordinance, and the changes materially increased the cost of the improvement.

The fact that if the improvement had been constructed in accordance with the provisions of the ordinance the fin-

ished surface of the street would have been several feet below the grade of the viaducts and would have destroyed the usefulness of the street would not justify the city authorities in making an improvement not authorized by the legislative body of the city to be made. The power rested in the city council to repeal the ordinance if it was found to be defective and insufficient, and to adopt another ordinance providing for such other character of improvement as the judgment and discretion of the city council should dictate. The city cannot let contracts for an improvement not authorized to be made by an ordinance and require the property owners to pay special assessments therefor on the ground that the work as done is more beneficial to the property owners than the improvement that was authorized by the ordinance to be made.

The judgment must be and is reversed and the cause will be remanded.

Reversed and remanded.

Subsequently, on petition for rehearing, the following additional opinion was filed:

Per CURIAM: Under a petition for rehearing we have again investigated this record. The appellee obtained leave to file an additional record, and it seems did place an additional record on file, but not, however, until after appellants had filed their abstract and brief. The additional record was not, however, abstracted, and did not come to the notice or knowledge of the court, nor is it referred to in the brief of the appellants. The principal grounds for a rehearing are based on this additional record, and hence on points not presented for decision by the submission of the cause. These points cannot, therefore, be considered for the first time on petition for rehearing. All matters presented and considered by the submission have been correctly decided. A rehearing is therefore denied.

MICHAEL G. O'BRIEN

v.

THOMAS P. BONFIELD *et al.*

Opinion filed December 22, 1904—Rehearing denied Feb. 8, 1905.

1. **WILLS—rule as to attestation of wills.** The Statute of Wills requires a will to be attested by two or more credible witnesses, and in case of the death of a witness proof of his handwriting is admissible with same effect as if he had appeared and testified in person.

2. **SAME—what is meant by "credible witness," as used in the Statute of Wills.** A "credible witness" to the execution of a will means one who would be legally competent to testify in a court of justice to the facts which he attests by subscribing his name to will.

3. **SAME—test of competency of subscribing witness.** The test of the competency of a witness to testify against heirs upon an issue involving the execution of a will is whether he will gain or lose, financially, as the direct result of the suit, or whether the judgment or decree will be evidence for or against him in another action.

4. **SAME—subscribing witnesses do not exercise judicial power.** A subscribing witness to a will, in giving his opinion as to the testator's mental capacity, does not exercise judicial power or judicial functions, and is not necessarily rendered incompetent as such witness by reason of a relationship which might disqualify him as a judge or juror in a suit between the heirs and the devisees.

5. **SAME—one not incompetent to attest will because grandson is a legatee.** A person is not incompetent to testify as a subscribing witness to a will because his grandson is a legatee under the will.

6. **SAME—will not invalid because person who drew it is named as executor.** The fact that the person who drew the will or assisted in its preparation is named as executor does not invalidate the will.

7. **CONSTITUTIONAL LAW—statutory provision concerning a subscribing witness not unconstitutional.** The provision of section 2 of the Statute of Wills, concerning subscribing witnesses to wills and the effect of their testimony, is not unconstitutional, as delegating judicial power to the witnesses.

8. **SAME—limiting evidence of mental capacity on probate is not unconstitutional.** The Statute of Wills, in limiting the evidence of mental capacity to the testimony of the subscribing witnesses on application for probate and on appeal from an order of probate, is not in contravention of any constitutional rights of the heirs, since the probate of a will is not a final adjudication of the testator's mental capacity and does not affect the right of the heirs to contest the will.

APPEAL from the Circuit Court of Iroquois county; the Hon. R. W. HILSCHER, Judge, presiding.

OTTO GRESHAM, and A. F. GOODYEAR, for appellant:

The word "credible" in the statute means "competent." *In the Matter of Noble*, 124 Ill. 266.

In all jurisdictions an attesting witness to a will exercises judicial powers. *Cornwall v. Isham*, 1 Day, (Conn.) 35; *Hawes v. Humphrey*, 9 Pick. 350.

In Illinois the attesting witnesses to a will in a proceeding as to the mental capacity of the testator or testatrix are judges, pure and simple, while the county judge, the circuit judge and the judges of this court are ministerial officers to ascertain the judgment of the attesting witnesses entered up at the time the will was executed. *Walker v. Walker*, 2 Scam. 291; *Duncan v. Duncan*, 23 Ill. 365; *Andrews v. Black*, 43 id. 256; *Weld v. Sweeney*, 85 id. 50; *In re Will of Ingalls*, 148 id. 287; *Heirs of Critz v. Price*, 106 id. 167; *Claussenius v. Claussenius*, 179 id. 545; *Baker v. Baker*, 202 id. 595; *In re Estate of Arrowsmith*, 206 id. 352; Horner on Probate Law, sec. 54; *Ferguson v. Hunter*, 2 Gilm. 657; *Doran v. Mullen*, 78 Ill. 342.

A judge who is related to a party to a cause before him is ineligible to sit. Hurd's Stat. 1901, chap. 146, sec. 1.

A gift to a child through the father's agency is the same as a gift to the father. *Hughemin v. Baseley*, 14 Ves. 273.

R. J. Hanna was grandfather to Thomas W. Hanna, one of the devisees named in the will, and is therefore incompetent as an attesting witness to the will. Especially is this true as this attestation takes the property from an heir and vests it in his blood—a stranger to the blood of Mary A. Williams. *Panand v. Jones*, 1 Cal. 488.

Our proposition in the court below was and in this court is, that the competency of a witness to a will, under the Illinois statute, is governed by a different rule than the rule which determines the competency of a witness in an action

at law or a suit in chancery in this State. In short, a competent witness does not make a competent juror or judge. *In Matter of Noble*, 124 Ill. 266; *Shannon v. Shannon*, 208 id. 252; *Carleton v. Carleton*, 40 N. H. 17; Hurd's Stat. 1901, chap. 146, sec. 1; chap. 78, sec. 2; chap. 38, sec. 279.

If the court holds R. J. Hanna a competent witness under the statute, then the statute as enforced in this proceeding is unconstitutional as against the natural rights of the appellant, as against his rights under the constitution of this State and the United States. Const. of 1870, art. 6, sec. 1; art. 2, sec. 2; 5th amendment and sec. 1 of 14th amendment to Const. of United States; *State v. Maynard*, 14 Ill. 422; *Hall v. Marks*, 34 id. 358; *Missouri River Tel. Co. v. Bank*, 74 id. 217; *Hardy v. Burton*, 79 id. 504; *Speight v. People*, 84 id. 595; *People v. Rose*, 207 id. 352; Cooley's Const. Lim. (7th ed.) 589, 591; *State v. Noble*, 118 Ind. 350; *In re Janitor*, 35 Wis. 410; *State v. Smith*, 82 Mo. 51.

The presumption is against the validity of a will in which the lawyer who drew it is made the executor. *St. Leger's Appeal*, 34 Conn. 434; *Drake's Appeal*, 45 id. 9; *Hardley v. Cuthbertson*, 108 Pa. St. 395; *Boyd v. Boyd*, 66 id. 283.

This court does not approve of a lawyer drawing a will, witnessing it and acting as an attorney to sustain it. *Drach v. Kamberg*, 187 Ill. 385.

A will was not sustained where the attorney who drew it was made executor, with power to sell all the property of the testator and pay legacies. *Keithley v. Stafford*, 126 Ill. 507.

FREEMAN P. MORRIS, and FRANK L. HOOPER, for appellee Bonfield:

"Credible witnesses," as used in the statute relating to wills, has been construed, both in England and in this country, to mean competent witnesses,—that is, such persons as are not legally disqualified from testifying in courts of justice by reason of mental incapacity, interest or the commission of crime, or other cause excluding them from testifying

generally or rendering them incompetent in respect of the particular suit. *Boyd v. McConnell*, 209 Ill. 396; *In the Matter of Noble*, 124 id. 266; *Johnson v. Johnson*, 187 id. 86; *Sloan v. Sloan*, 184 id. 579; *Harp v. Parr*, 168 id. 459; *Title and Trust Co. v. Brown*, 183 id. 42; *Fisher v. Spence*, 150 id. 253; 29 Am. & Eng. Ency. of Law, (1st ed.) 231.

The test of the interest of a subscribing witness in a will is whether he will either gain or lose, financially, as the direct result of the proceeding to establish the will, or whether the record will be legal evidence for or against him in some other action. *Boyd v. McConnell*, 209 Ill. 396; 1 Greenleaf on Evidence, sec. 390; *Pyle v. Pyle*, 158 Ill. 289; Schouler on Wills, (3d ed.) par. 353, p. 353; 29 Am. & Eng. Ency. of Law, 233, 234; *Campbell v. Campbell*, 130 Ill. 466.

The interest which will constitute a disqualifying cause of objection must be pecuniary in its nature. *Boyd v. McConnell*, 209 Ill. 396; 1 Greenleaf on Evidence, sec. 386; *Pyle v. Pyle*, 158 Ill. 289; Rood on Wills, sec. 312.

The interest, to be disqualifying, must be, however, a present, certain and vested financial interest in the subscribing witness or in his or her husband or wife. *Pyle v. Pyle*, 158 Ill. 289; Schouler on Wills, (3d ed.) par. 353; Rood on Wills, par. 313; 29 Am. & Eng. Ency. of Law, 233, 234; 1 Greenleaf on Evidence, secs. 386, 390; 1 Underhill on Wills, sec. 207.

The interest growing out of the relation of parent and child does not disqualify either from becoming a competent attesting witness to a will whereby the other may receive a legacy or devise, much less can the claimed disqualification apply to the relation of grandparent and grandchild. *Nash v. Reed*, 46 Me. 168; Schouler on Wills, (3d ed.) sec. 353; 1 Greenleaf on Evidence, secs. 386-390; *Allen v. Allen*, 2 Over. 172; *Old v. Old*, 4 Devereux, 500; *Maxwell v. Hill*, 89 Tenn. 584.

The statutes of Illinois, in so far as they confine the testimony relative to the testamentary capacity of the testator to

the subscribing witnesses on the application for the probate of the will, do not confer judicial power upon the attesting witnesses in contravention of the State or Federal constitution; nor do such statutes deprive any prospective heir of any vested right without due process of law.

The right to take property by devise or descent is the creature of the law, and not a natural right or privilege, and therefore the authority which confers it may impose conditions upon it. *Magoun v. Bank*, 170 U. S. 283.

The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by owners, is undoubted. *United States v. Fox*, 94 U. S. 315.

The laws of descent and devise being the creation of the statute law, the power which creates may regulate and may impose conditions or burdens on a right of succession to the ownership of property to which there has ceased to be an owner because of death, and the ownership of which the State then provides for by the law of descent or devise. *Kochersperger v. Drake*, 167 Ill. 122.

Acts of the legislature cannot be regarded as opposed to the fundamental axioms of the organic law unless they impair rights which are vested. A mere expectation of property in the future is not a vested right, hence rules of descent are subject to change in their application to all estates not already passed to the heir by the death of the owner. No one is heir to the living. *Sayles v. Christie*, 187 Ill. 420; *Cooley's Const. Lim.* (6th ed.) 438, 439.

The law of Illinois in restricting the evidence relative to the testamentary capacity of the testator to that of the subscribing witnesses, on the application for the probate of the will, does not confer judicial power upon the attesting witnesses. They are permitted to express an opinion upon the mental capacity of the testator in accordance with a rule of evidence that exists independently of the statute. The tes-

timony of the subscribing witnesses is but one of a number of steps essential to the probate of the will. *Owners of Lands v. People*, 113 Ill. 296; *People v. Simon*, 176 id. 165; *Arms v. Ayer*, 192 id. 601.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court :

The county court of Iroquois county admitted to probate the will of Mary A. Williams, deceased, a widow, who left no children or lineal descendant and no brother or sister. Appellant, a nephew, prosecuted an appeal to the circuit court of said county, where there was a trial *de novo* before the court and the will was again admitted to probate. Appellant then prosecuted this further appeal.

The execution of the will by Mary A. Williams was proved and was admitted by the appellant, and there was a formal attestation clause attached thereto, signed by R. J. Hanna and William Fraser as witnesses. R. J. Hanna, one of the subscribing witnesses, died before the will was probated, and proof of his handwriting was made and not disputed. The other subscribing witness, William Fraser, testified to all the facts required by the statute, and the will was fully proved if the attesting witnesses were competent to act as such. The claim of appellant is that R. J. Hanna was not competent to act as a subscribing witness, for the reason that his grandson, Thomas W. Hanna, was a legatee under the will, to whom \$1000 was bequeathed. The Statute of Wills requires a will to be attested by two or more credible witnesses, and in case of the death of a witness, proof of his handwriting is admissible with the same effect as if he had appeared and testified in his own person. The word "credible," as used in the statute, means "competent." (*In the matter of the will of Noble*, 124 Ill. 266.) It means a witness who, at the time of attesting a will, would be legally competent to testify in a court of justice to the facts which he attests by subscribing his name to the will. There can be

no doubt that a witness would be competent to testify against an heir on an issue involving the execution of a will and the mental capacity of the testator, although his grandson might be interested in the result of the litigation. The interest which disqualifies a witness in such a case must be a present, certain, legal interest of a pecuniary nature. The test is whether he will either gain or lose, financially, as the direct result of the suit, or whether the judgment or decree will be evidence for or against him in another action. *Boyd v. McConnell*, 209 Ill. 396.

Counsel do not deny that such is the rule to be applied to witnesses generally, but they say that by our statute the subscribing witnesses to a will are not mere witnesses; that they are made judges of the mental capacity of the testator and exercise judicial power in determining whether the testator is mentally competent to execute a will, and that it is their finding and judgment on that question which entitle the will to probate. They insist that Mr. Hanna was incompetent as a witness for the same reason that a judge who is related to a party to a cause is incompetent to hear and determine the cause. In other words, they say that a competent subscribing witness to a will must be competent to sit as a juror or judge in a suit between the heir and the legatees or devisees under the will. We cannot agree with counsel that the attesting witness exercises judicial power or judicial functions. It is true that no man can be a judge in his own cause or where he is related to a party in interest, and by our constitution the judicial powers are vested in certain courts. No law can vest judicial power in attesting witnesses and authorize them to adjudge, decide and render a judgment in a cause, and the Statute of Wills does not purport to do so. Proof of the mental capacity of the testator is one of the steps necessary to the probate of a will, and in the county court, or upon appeal from an order allowing probate, the parties are confined to the testimony of the subscribing witnesses on that question. (*Walker v. Walker* 2 Scam.

291; *Andrews v. Black*, 43 Ill. 256.) But the attesting witnesses, on the application for probate, do not exercise different powers or functions from any other witness testifying to a fact. They neither construe nor apply the law nor render a judgment.

Counsel also argue that if Mr. Hanna is held to be a competent witness the statute is unconstitutional, as against the natural right of the appellant to have his cause heard by an impartial judge, and in violation of section 1 of article 6 of the constitution, by taking from the judgment and consideration of the court the question of mental capacity of the testatrix and vesting it in the attesting witnesses. As we think that the witnesses, in testifying to the facts observed by them and in giving their opinion as to mental capacity based on such facts, are not exercising judicial power, it follows that we do not regard the statute as unconstitutional.

It is next contended that the will is void because it was written by an attorney who was named in it as executor. The will was prepared at the direction of the testatrix by Harrison Loring, who had been her attorney for many years. She was desirous of having Mr. Loring act as her executor but he declined to do so. She urged that his name should be put in, and said that if he would not act she wanted Mr. Bonfield, one of the appellees. Mr. Loring went to see Mr. Bonfield, who agreed to act, and the will was then prepared naming Mr. Loring as executor, with a provision that if he should be dead or unable to act, or should refuse to do so, Mr. Bonfield should be executor. There was no intention on the part of Mr. Loring to act, and he refused to do so before the will was offered for probate. But the fact that he was named as executor does not affect the validity of the will. The fact that the person who draws a will or assists in its preparation is named as executor may be one of the circumstances to be considered upon a different issue, but it has never been held, under our law, that a will would be invalid for that reason.

It is next argued that the Statute of Wills, as construed by this court to limit the evidence as to mental capacity on an application in the county court to probate a will, and on appeal from an order allowing probate, to the testimony of the subscribing witnesses, is in contravention of section 2 of article 2 of our constitution and the fifth amendment to the constitution of the United States, in depriving appellant of a share in the property of Mary A. Williams, as her heir, without due process of law, and also of section 1 of the fourteenth amendment to the constitution of the United States. As we understand the argument, it is that a statute is unconstitutional which limits the right of a contestant to introduce testimony, on an application to probate a will, on the subject of the mental capacity of the testator; that the heir has a constitutional right to demand that the court shall hear all the testimony he may offer to defeat a will which excludes him from his inheritance, and that the very essence of due process of law is the right to be heard upon all the evidence he can adduce. The proceeding to probate a will and admit it to record is not designed as a final and conclusive determination of the testamentary capacity of the testator upon all the evidence that may be produced. The purpose is only to establish testamentary capacity *prima facie* in order that the will may be recorded, the estate cared for and the administration proceed. (*Claussenius v. Claussenius*, 179 Ill. 545; *Moody v. Found*, 208 id. 78.) The provision of the Statute of Wills is, that upon certain proof being made to the court the will shall be admitted to record. That proof embraces the execution of the will and the capacity of the testator to make it, with a reservation to any party interested, of the right to show fraud, compulsion or other improper conduct sufficient to invalidate or destroy the will. The act of 1897 provides for notice to heirs, but no issue is formed and there is no final judgment as to the validity of the will. The law provides for a proceeding in which an issue is to be made whether the writing is the will of the testator or not, where

that question is finally to be determined. The right to file a bill and have such an issue formed is in no manner affected by the fact that some or all of the contestants may have appeared in the county court and cross-examined the subscribing witnesses to the will. (*Shaw v. Moderwell*, 104 Ill. 64.) The right is not denied, limited or affected in any way by the fact that the will has been admitted to record, but in that proceeding the validity of the will is presented as a new and original question, without reference to the fact of probate. (*Tate v. Tate*, 89 Ill. 42.) The whole question is heard anew, and the burden of proof of due execution and mental capacity is upon the proponents of the will to the same extent as it was before the probate. (*Potter v. Potter*, 41 Ill. 80.) The statute does not permit a will to be recorded without certain proof, but it does not deprive any party of his property without due process of law. On the contrary, it affords ample protection to the heir, who may call upon those claiming under the will to establish its validity.

It is said that the court erroneously refused to consider certain testimony introduced by appellant on the question of the mental capacity of the testatrix. The testimony was heard by the court subject to objection and was never stricken out, and there was no subsequent ruling concerning it. There is nothing in the record to show whether it was considered or not, but if the court refused to consider it the refusal was right.

Errors are also assigned on many rulings of the court in refusing to admit evidence offered by appellant, but the rulings were all in harmony with the views we have expressed.

The judgment is affirmed.

Judgment affirmed.

CHARLES FLOTO

v.

MARGARET FLOTO, EXRX.

Opinion filed December 22, 1904—Rehearing denied Feb. 8, 1905.

1. JUDGMENTS AND DECREES—*when a judgment probating will is without jurisdiction.* A judgment of the county court probating a will is without jurisdiction as to known heirs whose whereabouts were known but who were not named as heirs in the petition to probate the will nor given notice of the petition under the statute.

2. SAME—*when petition to set aside probate of will is not barred.* A petition to set aside the probate of a will upon the ground that petitioners were known heirs who were not given notice of the probate proceedings although their whereabouts were known, is not barred by the fact that they had knowledge that the probate court was acting without jurisdiction, nor by the fact that the estate has been settled.

APPEAL from the Circuit Court of Ogle county; the Hon. O. E. HEARD, Judge, presiding.

JOSEPH SEARS, and FRANCIS BACON, for appellant.

J. C. SEYSTER, J. H. STEARNS, and O. R. ZIPF, for appellee.

Mr. CHIEF JUSTICE RICKS delivered the opinion of the court:

Ernest Floto died April 17, 1900, leaving an estate worth about \$20,000, consisting of realty and personalty. He had no children or descendants of children, but left his widow and certain collateral kindred as his heirs-at-law. In May of that year Margaret Floto, his widow, filed a petition to probate an alleged last will and testament of the deceased. In this petition the appellee named as heirs-at-law and next of kin of her husband only herself and Lewis Floto, a brother of the deceased, suggesting in her petition that there might

be other heirs-at-law in Germany but that their identity or their whereabouts was unknown. Upon this petition, and with notice to herself and the brother and publication of notice to the unknown heirs, the will was probated and the estate administered upon.

Appellant lived in Griswold, Iowa, and had some years previously been a resident of Forrester, where the decedent had resided for many years. On the 24th day of July, 1903, the appellant filed in the county court of Ogle county, where the will was probated, his petition to set aside the probate of the will, alleging that he was the son of a deceased brother of the decedent, Ernest Floto; that the widow, Margaret Floto, at the time she filed the petition for the probate of the will, knew that appellant was a nephew and heir-at-law of said Ernest Floto, and that she knowingly and designedly left his name out of said petition in order that he might not know of the proposed probate of the will. He further alleges that Lewis Floto, Fred Floto and Mary Mueller were all residents of Ogle county at the time of filing said petition and were nephews and niece and heirs-at-law of the decedent, and that their names were not mentioned in said petition, and that they had no notice of the filing of said petition or the probate of said will; that said Margaret Floto well knew all the said persons named were heirs-at-law of her said deceased husband and knowingly and designedly left their names from the petition. He further represents, upon his knowledge, information and belief, that the alleged will was not the true last will and testament of said Ernest Floto, and that if he had had notice of its presentation for probate he could have successfully defended against the probate thereof; that said will was admitted to probate about the first of June, 1900, without contest, and that appellant did not learn of the fact of such probate of said will or the death of said Ernest Floto until some time in the latter part of May, 1903, and until such time as it was too late to take an appeal from the order admitting the same to probate. He

further says that the widow, Margaret Floto, was the only devisee or legatee mentioned in said alleged will.

Margaret Floto filed an answer to this petition, admitting that in her petition for the probate of said will she only mentioned the parties as alleged in the petition of appellant and that only those parties were notified. She denies that appellant is a nephew and heir-at-law of her deceased husband, and also denies that the other persons mentioned in appellant's petition were heirs-at-law of her said husband, and denies that they did not have notice; denies that she knew of the whereabouts of appellant, and avers that the said will was the true last will and testament of the decedent, and avers that appellant had notice or knowledge of the probate of said will.

The will was admitted to probate on the 14th of June, 1900. No executor was named in the will, and the widow, Margaret Floto, was appointed administratrix with the will annexed, and administered and settled the estate before the filing of this petition. The cause was heard in the county court and the prayer of the petition was denied. The cause was appealed to the circuit court, and upon the hearing in that court it was again denied, and this appeal is prosecuted.

The evidence discloses that Ernest Floto, the decedent, was born in Germany in 1820, and that he had two brothers, —Charles, sometimes called Carl, and Lewis,—all of whom came to this country, Carl and Ernest coming about the same time and settling in Ogle county more than fifty years ago. Carl married first and Ernest lived with him part of the time. Carl died about thirty-seven years ago, leaving four boys and a girl, the boys being named, respectively, Charles, Fred, William and Lewis, and the daughter was named Mary and has intermarried with one Fred Mueller. The widow and children of Charles, except appellant, continued to live in Ogle county from the time of his death to the present time. About fifteen years ago appellant went to Iowa and has ever since made that his home. The time of the marriage

of Ernest to appellee is not shown, but she states that she came to Forreston to reside in 1891. Appellant's mother and his brothers and sister lived in that vicinity from that time to the death of Ernest. Appellee knew the widow of Charles, whose name was Christina, and knew other members of the family, and that they claimed to be the children of Charles, the brother of Ernest. The evidence shows that shortly before the will was probated, during the month of May, 1900, appellee went to the home of Fred Floto, one of the nephews, and asked for a list of the heirs of her deceased husband, and that Fred there gave her a list of the heirs, with their places of residence. The evidence also shows that in the matter of probating the will appellee had an attorney, and that on the 28th of April, 1900, this attorney wrote Fred Mueller, the husband of Mary, stating that it was proposed to probate a will purporting to be the will of Ernest, and that it was necessary that the names of the heirs be known so that they could be stated in the petition. In response to this letter Fred Mueller and Fred Floto went to the office of appellee's attorney prior to the time the will was probated, but possibly after the petition was filed, and gave to him a list of the children of Charles Floto and heirs of Ernest Floto. The evidence also discloses that when appellee went to settle the estate she filed a petition, in which she stated that Lewis Floto, of Dixon, who was the brother, Fred Floto, of Forreston, the nephew, Lewis Floto, of Mt. Morris, Illinois, and Charles Floto, appellant, whose address she put as Canby, Minnesota, and Mary Mueller, were heirs-at-law of Ernest Floto.

We have examined the evidence carefully, and from it there cannot remain the slightest doubt but that petitioner and his brothers and sister were nephews and niece and heirs-at-law of Ernest Floto. Nor is there any doubt but that appellee knew and understood such to be the fact, and that she was advised of their whereabouts and of their kinship prior to filing the petition. The appellee denies that she

went to Fred Floto's to get the information, or did get the information, in regard to the heirs. That she did do so is established by three witnesses, the testimony of all of whom seems fair and is only contradicted by hers, and her credibility was directly attacked and put in such question that it can be given little weight.

We do not regard the fact of knowledge and notice on the part of appellee as controlling in this matter, although we do find that she had both, and if it required fraud on the part of appellee to authorize the setting aside of this probate we would not hesitate to find it established by the evidence in this case. We think, however, the court did not have jurisdiction to probate the will. Here were heirs that were known and could not be placed in the designation of unknown heirs. Their whereabouts was known. They were entitled by the statute to have notice of this probate. They did not have it and the court did not have jurisdiction to enter probate without it. This question has been so thoroughly discussed and settled and placed upon the ground of want of jurisdiction in the case of *Wright v. Simpson*, 200 Ill. 56, it does not seem necessary to extend the discussion of it. Courts of other States have taken the same view. *Estate of Charlebois*, 6 Mont. 373; *In re Lyon's Will*, 26 N. Y. Supp. 469; *Sowell v. Sowell's Admr.* 40 Ala. 243; *In re Bartel's Estate*, Myr. Pro. 130; *In re Cobb's Estate*, 49 Cal. 599; *In re Odell's Estate*, 23 N. Y. Supp. 144; *In re Lawrence's Will*, 7 N. J. Eq. 215; *Ray v. Segrist*, 19 Ala. 810; *Boyles v. Boyles*, 37 Iowa, 592; *Gregg v. Myatt*, 78 id. 703.

It is said that some of these heirs had notice that the will was going to be probated, by their conversations with the attorney and with appellee, and that the record shows that appellant had notice of the death of Ernest within a short time after the probate of the will and before the settlement of the estate, and that therefore they cannot insist upon the want of jurisdiction of the court. Such is not the law. Where a court acts without jurisdiction, knowledge of par-

ties interested that it is so going to act or has so acted can not confer jurisdiction upon it. (*Canfield v. Wooster*, 26 Conn. 384; *Gray v. Gray*, 60 N. H. 28.) Nor does the fact that appellee has settled the estate furnish a bar to this proceeding. *In re Odell's Estate*, *supra*.

The judgments of the circuit court and the county court of Ogle county are reversed and the cause is remanded to the county court of Ogle county, with directions to grant the prayer of the petition to set aside the order probating the will and all subsequent orders that can affect the rights of appellant, when such proceeding may be had in reference to the probate, upon due notice, as the law requires.

Reversed and remanded.

E. A. CUMMINGS & CO. *et al.*

v.

THE PEOPLE *ex rel.* John J. Hanberg, County Treasurer.

Opinion filed December 22, 1904—Rehearing denied Feb. 9, 1905.

1. SPECIAL ASSESSMENTS—*park board may avail itself of provisions of the Local Improvement act of 1897.* A board of park commissioners is a corporate authority having power to levy special assessments in certain cases, and in so doing may avail itself of the provisions of the Local Improvement act of 1897 by virtue of the express authority conferred by sections 1 and 98 of the act itself.

2. SAME—*paragraph 5 of section 99 of Local Improvement act construed.* Paragraph 5 of section 99 of the Local Improvement act, (Laws of 1901, p. 118,) providing that when any "installment of an assessment confirmed under prior acts shall mature, proceedings to return the same delinquent and to collect the same shall conform to the provisions of this act," is a limitation upon paragraph 4, and applies to assessments confirmed under prior acts even though not payable in installments.

3. SAME—*when provisions of Revenue act do not apply.* The provisions of section 178 of the Revenue act, prescribing a method of return for a delinquent special assessment, and section 279, barring collection of a special assessment not returned delinquent by a

certain time, do not apply to a special assessment made by park commissioners under the Local Improvement act of 1897, where they have followed sections 61 to 67, inclusive, of that act.

4. JUDGMENTS AND DECREES—*what does not invalidate judgment of sale.* A judgment of sale signed by the judge and correctly giving the number of the warrant and the assessment is not invalid because it describes the corporate authority levying the assessment as "The Board of West Park Commissioners" instead of "The Board of West Chicago Park Commissioners," nor by the fact that there is an unsigned order in the record purporting to be another judgment of sale for the same assessment.

APPEAL from the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

GEORGE W. WILBUR, and F. W. BECKER, for appellants.

DEHAVAN B. COLE, for appellee.

Mr. CHIEF JUSTICE RICKS delivered the opinion of the court:

This is an appeal from a judgment of sale for a special assessment made by the West Chicago Park Commissioners, who are by statute invested with the power to make local improvements by special assessment.

The original proceedings out of which this controversy arises were begun in 1893. The Park act of 1873 (Starr & Cur. Stat. 1896, p. 2862-2870,) at that time provided that the proceedings for the levy and collection of special assessments for park purposes should in all things, as near as may be, conform to the provisions of article 9 of the City and Village act. At the time the levy of the original assessment was made, the City and Village act authorized special assessments to be collected in installments, the right so conferred being by an amendment of article 9 of the City and Village act, approved April 20, 1887. When the first installment became due, judgment and order of sale were entered against certain property, and on appeal to this court the judgment was reversed on the ground that the provision of the Park

act authorizing the commissioners to pursue the provisions of article 9 of the City and Village act was not broad enough to include the amendments that might be adopted to the latter act. (*Culver v. People*, 161 Ill. 89.) Following this decision several writs of error were prosecuted by other property owners and in each case the judgment of the county court was reversed. Pending these appeals and writs of error, the legislature, in 1895, passed a new act concerning park improvements, under the title of "An act to enable park commissioners or park authorities to make local improvements and provide for the payment therefor." (Hurd's Stat. 1899, chap. 105, p. 1242.) This act conferred upon park commissioners authority to levy and collect special assessments to pay for an improvement that had been authorized and partly or wholly completed and the assessment therefor had been set aside by the courts. Pending the various writs of error relative to the original assessment, the improvement of Douglas boulevard, for which the present assessment is levied, was completed, and in 1896 an ordinance was passed for the special assessment now in controversy to pay for that improvement. Upon the return of the assessment roll to the county court in April, 1897, the court refused confirmation of the assessment and dismissed the petition. From that decision an appeal was prosecuted to this court and the judgment of the county court was reversed. (*West Chicago Park Comrs. v. Farber*, 171 Ill. 146.) When the cause was remanded and re-docketed the assessment roll was confirmed, and from that judgment of confirmation these appellants prosecuted an appeal to this court and the judgment of confirmation was affirmed. (*Cummings v. West Chicago Park Comrs.* 181 Ill. 136.) Writs of error were then sued out to the Supreme Court of the United States to review the judgment of this court and those writs were dismissed. The judgment of confirmation of this assessment was made in 1898, under proceedings begun prior to the passage of the Local Improvement act of 1897. In

April, 1902, the mandate of this court finally establishing the confirmation was filed in the county court. The warrant for the assessment was returned to the county collector on the 30th day of January, 1903, but for some irregularity in that proceeding judgment was refused, and on the 14th day of March, 1904, the special collector of the West Chicago Park Commissioners again returned the property delinquent for special assessment to the county collector and judgment of sale was entered at the July term, 1904, from which this appeal is prosecuted.

The objection filed below by appellants that is relied upon in this court is, that the assessment was barred by the limitation as found in section 279 of chapter 120, entitled "Revenue," which reads: "When any special assessment is not returned to the county collector on or before the first day of March next after it is due, the same may be returned on or before the first day of March in the succeeding year; and, if not then returned, it shall be considered barred, unless return is prevented by an injunction or order of court; and the time such return is thus prevented shall be excluded from the computation of such time." (Hurd's Stat. 1899, p. 1441.) And it is also contended by appellants that the return in this case is controlled and must be made according to sections 178 and 179 of the Revenue act. To this contention it is replied by appellee that the Revenue act and these provisions have no application, and that the lien of the assessment, and the method of procedure for its collection, are governed by the provisions of article 9 of the City and Village act of May 10, 1872, and thus is presented the main question for our consideration.

By sections 11, 12, 13, 14 and 15 of chapter 105 of the Park act, which relate to the proceedings after the filing of the assessment roll, it is provided that the proceedings shall be according to article 9 of the City and Village act and all acts amendatory thereof. It is contended by appellants that the Local Improvement act of 1897 is not an amendment of

article 9 of the City and Village act, but is an independent act, and that the provisions of the Park act that the proceedings may be had under said article 9, and the acts amendatory thereof, do not bring the case within the provisions of the Local Improvement act. In *Gorton v. City of Chicago*, 201 Ill. 534, where a somewhat similar question arose, we said (p. 535): "By the act in force July 1, 1897, the law respecting special assessments for local improvements was revised and materially changed and all prior laws in conflict therewith were expressly repealed." And on page 538 it is said: "The object and purpose of the new law are the same as the old. It imposes no new liability upon appellants, but merely affects the procedure against them in the collection of the special assessment."

We think, if this case depended upon it and it were necessary to sustain the judgment, we would be warranted in holding that, within the meaning of the expression in the Park act that article 9 of the City and Village act, and all acts amendatory thereof, should be applicable to the proceedings relating to park assessments, the Local Improvement act of 1897 is an amendment to article 9, for there can be little difference between a revision of an act and an amendment to it. The main difference would be in testing the constitutionality of the act as amended by the title of the act. But we do not deem it necessary to so hold in this case. The proviso to section 1 of the Local Improvement act of 1897 (Hurd's Stat. 1899, p. 362) is as follows: "This act shall apply only to such cities and villages as are now, or shall hereafter become, incorporated under an act entitled 'An act to provide for the incorporation of cities and villages,' approved April 10, 1872, in force July 1, 1872, and to all cities, villages and incorporated towns which have heretofore adopted article 9 of the act above mentioned, in the manner therein provided, or shall hereafter adopt this act, as herein provided; but all other corporate authorities, having power to levy special assessments or special taxes for local improve-

ments, may make use of the provisions of this act for that purpose in the manner hereinafter provided." By the last clause of the above proviso the provisions of the act are extended to all corporate authorities, other than cities and villages, having power to levy special assessments or special taxes for local improvements, and they are not required, as are cities and villages that were incorporated by special charters, to adopt article 9 of this act in any formal way to avail of it. Section 98 of the same act also provides: "Wherever authority of law now exists in corporate authorities in this State to levy special assessments or special taxes for local improvements, and for that purpose to use the proceedings or methods provided by article 9 of an act entitled 'An act to provide for the incorporation of cities and villages,' approved April 10, 1872, in force July 1, 1872, such corporate authorities are hereby authorized to make use of the provisions of this act for such purpose, with the same effect and to the same extent as heretofore authorized to use the provisions of said article 9; and any such corporate authorities as may be hereafter authorized by law to levy such special assessments or special taxes, may, whether otherwise expressly authorized thereto or not, make use of the provisions of this act in like manner."

With these broad, sweeping provisions it would seem unnecessary to go into any lengthy consideration of the question whether the park commissioners could avail themselves of the provisions of the Local Improvement act of 1897 by virtue of the authority given them in the Park act, when the act of 1897 itself confers such unlimited power and authority upon them. Appellee is a corporation, and has express power to levy the particular assessment here in question, (Park act, sec. 2,) and being such, is invested with full power, under sections 1 and 98 of the Local Improvement act, to avail itself of the provisions of the latter.

It is contended by appellants that the Local Improvement act cannot apply to this proceeding because of the provisions

of section 99 of the latter act. The section referred to contains the repealing and saving provisions of the act. The section provides that laws subsisting at the time the act takes effect "shall continue to apply to all proceedings [1] for the condemnation of lands, [2] or the confirmation of special assessments * * * which were pending in any court, * * * [3] to all proceedings for the collection of any deficiency under past levies, already made under any laws existing; * * * [4] and also to all proceedings for new assessments made in lieu of others annulled before the act concerning local improvements of June 14, 1897, took effect by order of some court. [5] When any installment of an assessment confirmed under prior acts shall mature, proceedings to return the same delinquent and to collect the same shall conform to the provisions of this act."

Appellants direct our attention to the fourth provision above quoted, and say that the assessment now sought to be collected falls within its terms; that it is a new assessment in lieu of another assessment annulled by order of court, and that the proceedings for the collection as well as for making the new assessment must be carried on, if at all, under some law existing prior to the act of 1897. They further urge that the fifth provision above quoted has no application to this case as it is confined to "installments," and that the assessment in question was not by installments, but is for the whole cost in one payment.

With this contention of appellants we do not agree. The rule that all parts of an act must be construed together to determine the true meaning is familiar and will not be questioned. The fourth proviso above was contained in the original repealing clause of the act of 1897, but the fifth proviso was not enacted until 1901. (Laws of 1901, p. 118.) It may be well doubted whether, under the language of proviso 4 and without proviso 5, this court would feel warranted in holding that proviso 4 referred not only the making of the assessment, but the collection of it as well, to prior existing

laws. There is a well defined distinction between the proceedings for an assessment and the proceedings for the collection of it by judgment and sale of the property. But proviso 5 must, if it be given effect, be held to be a limitation on or qualification of proviso 4, so far as it applies to it or the assessment that may be made for the purpose it refers to. The terms of the language used in the fifth proviso do not restrict its application to the proceedings referred to in any one of the previous provisions, and if it has application to one there is nothing appearing in the act itself to prevent its having application to all.

The contention that the word "installment" has a special and restricted meaning, and cannot be applied to an assessment confirmed under a prior act but must be applied to an installment of an assessment we think too narrow, and, in view of the proviso, unsound. Under the Local Improvement act of 1897, judgment of sale of delinquent lands for special assessments is to be at the same time, and controlled the same, as an application for judgment for State, county and general taxes. (Sec. 67.) The delinquent list must be filed with the county collector on or before April 1, and the county collector is required to give the same notice that is given in the case of other taxes. (Sec. 67.) If special circumstances do not require otherwise, one judgment can be entered covering the taxes, general, local and special, and special assessment. (Revenue act, sec. 191.) And the evident purpose of the fifth proviso was to have some uniformity in the making up of the "tax, judgment, sale, redemption and forfeiture record," (Revenue act, sec. 200,) and the advertisement and judgment,—in other words, the whole proceeding for the collection of taxes by the general tax officer. No one can conjure the remotest reason why an installment, which is, as strictly understood, a part of the whole, should pursue one course that payment might be enforced, and an assessment payable in one payment or installment must pursue another. Such a construction would both

seem absurd and work absurd results not in keeping with the purpose of the proviso, and should, if possible, be avoided. (*People v. City of Chicago*, 152 Ill. 546.) The proviso does not say its effect is confined to assessments payable in installments, but is, "when any installment of any assessment confirmed under prior acts," etc. This assessment was confirmed under a prior act, and instead of being payable in several installments is payable in one payment. It is common to inquire of an assessment whether it is payable in one or several installments, and while it cannot be a strictly accurate expression according to the definition of "installment," still we think such was the sense in which the word was used in the proviso under discussion, and that the word, in the connection used, might properly be held to cover the whole or any part of an assessment confirmed under prior acts. As we think, the park commissioners were authorized, by both the Park act of 1895 and the Local Improvement act of 1897, to adopt and follow the provisions of the latter act.

We have examined the record and also find that in the proceeding before us the park commissioners did adopt and follow literally the provisions of sections 61 to 67, inclusive, of the act of 1897, and that the provision as to returns found in section 178 of the Revenue act, and the provision of section 279 of the same act prescribing a time or limitation, have no application to this assessment, and that the proceeding and lien are not controlled by them. *People v. Pierce*, 90 Ill. 85; *Potwin v. Johnson*, 108 id. 70; *Gross v. People*, 193 id. 260.

Appellants direct our attention to two judgments of sale which they say were entered on this assessment. They say that one of the judgments was signed by the judge and one of them was not signed by him, and that that, at least, is error. Section 191 of the Revenue act requires that the judgment shall be signed by the judge. The judgment that is signed by him gives the number of the warrant and the number of the assessment; the other is not signed and is

mere surplusage, and does not render the judgment entered and signed and relating to the same assessment void, nor is it such error as should work a reversal of the signed judgment. To the one that is signed it is only objected that the name of the park commissioners is not correctly stated. It is there designated as "The Board of West Park Commissioners," while appellants point out that the name is "The Board of West Chicago Park Commissioners." We do not think this variance so material as to call for a reversal of the judgment. The judgment is in the name of the county treasurer and *ex officio* collector, and the other matters are descriptive of what the judgment is for, and we think are sufficiently certain that there is no likelihood of a double sale for the satisfaction of the assessment.

The judgment is affirmed.

Judgment affirmed.

THOMAS H. HULBERT

v.

THE CITY OF CHICAGO.

Opinion filed December 22, 1904—Rehearing denied Feb. 9, 1905.

1. SPECIAL ASSESSMENTS—*when the engineer's estimate of cost is sufficiently itemized.* The engineer's estimate of the cost of an improvement to be built by special assessment is sufficiently itemized, so far as the property owners are concerned, if it is sufficiently specific to give them a general idea of the estimated cost of the substantial, component elements of the improvement.

2. SAME—*when resolution adhering to prior resolution is sufficient.* If, on the public hearing, no change is made in the proposed improvement, it being determined to construct the improvement in accordance with the first resolution, all that is required of the board is to pass a resolution adhering to the first resolution in general terms sufficient to identify the proposed improvement.

3. CONSTITUTIONAL LAW—*statute fixing rate of interest on deferred installments is valid.* Sections 42 and 86 of the Local Improvement act, fixing the rate of interest upon deferred installments

of a special assessment, and the bonds issued therefor, at five per cent, is not unconstitutional, as depriving property owners of property without due process of law by precluding the city from negotiating for a lower rate of interest.

4. APPEALS AND ERRORS—*rule where the evidence heard in open court is conflicting.* If the evidence upon the question of benefits in a special assessment case is heard in open court and is conflicting, the finding of the lower court will be upheld unless error is manifest.

APPEAL from the County Court of Cook county; the Hon. L. C. RUTH, Judge, presiding.

GEORGE W. WILBUR, for appellant.

ROBERT REDFIELD, and FRANK JOHNSTON, Jr., (EDGAR BRONSON TOLMAN, Corporation Counsel, of counsel,) for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

This is an appeal from a judgment of the county court of Cook county confirming an assessment to defray the cost of paving Drake avenue from Milwaukee avenue to West Fullerton avenue, in the city of Chicago.

It is first objected that the estimate of the cost of the improvement by the engineer is not sufficiently itemized. The estimate of the engineer, omitting the preamble and the engineer's certificate and signature, is as follows:

"Estimate.

Granite concrete combined curb and gutter on cinders,	
7126 lineal feet at 70 cents.....	\$4,988.20
Paving with asphalt on six inches of Portland cement	
concrete swept with natural hydraulic cement, 11,-	
349 square yds. at \$2.50.....	28,372.50
Adjustment of sewers, catch-basins and man-holes....	1,139.30

Total.....\$34,500.00"

Section 7 of the Local Improvement act (Hurd's Stat. 1903, p. 392,) provides that when the board of local improvements shall originate a local improvement to be paid

for by special assessment or special taxation, it shall adopt a resolution describing the proposed improvement, which resolution shall be at once transcribed into the records of the board, and shall fix a time and place for the public consideration thereof, which shall not be less than ten days after the adoption of said resolution, and "shall also cause an estimate of the cost of such improvement * * * to be made in writing by the engineer of the board * * * over his signature, which shall be itemized to the satisfaction of said board, and which shall be made a part of the record of such resolution," and a five days' notice, by mail, of the public hearing is required to be given to the person who paid the general taxes for the last preceding year on each lot, block, tract or parcel of land fronting on the proposed improvement.

In *Bickerdike v. City of Chicago*, 203 Ill. 636, and *Kilgallen v. City of Chicago*, 206 id. 557, the proceedings required by said section of the statute are held to be jurisdictional, and that a valid ordinance cannot be passed for a local improvement to be paid for by special assessment or special taxation without a compliance therewith; and in *City of Peoria v. Ohl*, 209 Ill. 52, that the engineer's estimate must be itemized, and that the statement by the engineer of the cost of the sidewalk, to be built by special taxation, in gross, was not a compliance with the statute. It was, however, said in *Lanphere v. City of Chicago*, 212 Ill. 440, that a substantial compliance with the provisions of the statute is all that is required; and in *Gage v. City of Chicago*, 207 Ill. 56, that it is not necessary that the resolution describe the improvement with the same particularity as it is required to be described in the ordinance. We think the estimate of the engineer above set forth as itemized was sufficiently specific to give the property owner a general idea of what it was estimated the substantial component elements of the improvement would cost, and that it is in substantial compliance with the requirements of the statute.

It is next contended that the resolution of the board of local improvements adhering to the proposed improvement was insufficient, which resolution was in the following form:

"January 14, 1904.

BOARD OF LOCAL IMPROVEMENTS.

" * * * A meeting of the board of local improvements was held in room 203 for the purpose of giving public hearing to the property owners interested in sundry proposed improvements, as above set forth, pursuant to resolution heretofore adopted by said board, and in accordance with notices which, on evidence submitted, the board finds have been mailed pursuant to statute, at which hearing for public consideration the following resolutions were adopted, to-wit:

"PROCEEDED WITH:

*"Resolved by the Board of Local Improvements of the City of Chicago, That the following local improvements be made and adhered to pursuant to prior resolutions heretofore adopted for the same, to-wit: * * * Paving, asphalt, Drake avenue, from West Fullerton avenue to Milwaukee avenue." * * **

Section 8 of the Local Improvement act provides: "In case any person shall appear to object to the proposed improvement or any of the elements thereof, said board shall adopt a new resolution abandoning the said proposed scheme or adhering thereto, or changing, altering or modifying the extent, nature, kind, character and estimated cost." In this case the improvement was not abandoned, changed, altered or modified, but it was determined at the public hearing to construct the improvement in accordance with the original resolution, therefore all that was required of the board was to pass a resolution adhering to the prior resolution. This was done, and the resolution, we are of the opinion, as adopted by the board was sufficient. Had the board at the public hearing altered, changed or modified the extent, nature, kind, character or estimated cost of the improvement, such modification or alteration should have been described with reasonable certainty in a new resolution.

It is next contended that sections 42 and 86 of the Local Improvement act, in accordance with the terms of which, by the ordinance, the assessment was divided into installments

and bonds to anticipate the payment of the deferred installments were provided for to be issued, is unconstitutional, on the ground that the legislature had no authority to fix the rate of interest which said installments and bonds should bear, at five per cent. No authority has been cited to sustain that position. It is, however, urged that the effect of said sections is to deprive the property owner of his property without due process of law, in this: that the rate of interest on the deferred installments and bonds cannot be fixed at a lower rate by the city than five per cent, and it is said that the city, if untrammelled by the statute, might be able to issue and negotiate the same at a lower rate than that fixed by the statute. We cannot agree with the view of appellant, but are of the opinion the legislature had the right to fix the rate of interest which said deferred installments and bonds, when issued, should bear, and that those sections of the statute are not in conflict with the constitution.

The question of benefits to the property of appellant was submitted to the court, a jury having been waived, and it is urged the property of appellant is assessed too high and for an amount greater than it will be benefited by the improvement. The evidence upon that question was conflicting. The judge before whom the case was tried heard and saw the witnesses, and we are unable to point out wherein his finding of fact was wrong. The rule is, where the evidence was heard in open court and is conflicting, the judgment of the lower court will be affirmed unless it is manifest that error has been committed. *Topliff v. City of Chicago*, 196 Ill. 215.

Finding no reversible error in this record the judgment of the county court will be affirmed.

Judgment affirmed.

HENRY H. GAGE

v.

THE PEOPLE *ex rel.* John J. Hanberg, County Treasurer.*Opinion filed December 22, 1904—Rehearing denied Feb. 9, 1905.*

This case is controlled by the decision in *Gage v. People*, (*ante*, p. 347.)

WRIT OF ERROR to the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

F. W. BECKER, for plaintiff in error.

WILLIAM M. PINDELL, (EDGAR BRONSON TOLMAN, Corporation Counsel, and ROBERT REDFIELD, of counsel,) for defendant in error.

PER CURIAM: This case is in all respects like the case of *Gage v. People*, (*ante*, p. 347,) except an additional error is assigned, in that the court entered judgment for costs, only. The opinion in the case of *Gage v. People*, *supra*, will accordingly govern, except that the court will also be ordered to enter a judgment for the special assessment applied for, together with costs, etc. Both the errors being upon the entry of the judgment it will not be necessary to award a new trial.

The judgment of the county court will accordingly be reversed and the cause remanded, with directions to that court, upon motion of defendant in error, to enter a judgment in compliance with section 191 of chapter 120, Hurd's Revised Statutes.

Reversed and remanded, with directions.

218	458
218	497
218	*505
218	522
218	*559
218	*619
214	568

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD CO.

v.

THE PEOPLE *ex rel.* Frank Sonnet, County Treasurer.*Opinion filed December 22, 1904—Rehearing denied Feb. 9, 1905.*

1. CONSTITUTIONAL LAW—*act of 1901, concerning levy of taxes, is not unconstitutional.* The act of 1901, (Laws of 1901, p. 272,) concerning the levy and extension of taxes, in so far as it requires the assessed valuation as equalized by the State board to be used in determining the maximum amount of tax to be raised under any statute of the State, is not unconstitutional.

2. SAME—*acts of May 9, 1901, and May 10, 1901, do not prescribe limitation upon taxation.* The acts of May 10, 1901, (Laws of 1901, p. 271,) amending sections 117 and 128 of the Revenue act, and the act of May 9, 1901, concerning the levy and extension of taxes, (id. p. 272,) do not prescribe a limitation upon taxation.

3. TAXES—*when valuation as equalized by State board must be used.* Under the acts of May 10, 1901, and May 9, 1901, (Laws of 1901, pp. 271, 272,) where county, road and bridge, district, school and village taxes are all levied up to the limit imposed by law, it is the duty of the county clerk, in extending such taxes, to use the assessed valuation as equalized by the State board for the current year, and not the assessed valuation made by the county board of review.

4. SAME—*failure to comply with statutory requirement vitiates tax.* Failure to substantially comply with the statutory requirements in exercising a grant of power to levy taxes is not a mere irregularity, but is a fatal omission which vitiates the tax.

5. SAME—*county board must specify amount required for each purpose.* Under section 121 of the Revenue act, if the county tax is required for several purposes it is the duty of the county board, in its resolution levying the tax, to state the amount required for each purpose separately.

APPEAL from the County Court of Adams county; the Hon. CHARLES B. McCrory, Judge, presiding.

At the June term, 1904, of the county court of Adams county the county collector made application for judgment and order of sale against appellant's property for delinquent tax for the year 1903. Appellant filed seventeen objections,

covering \$473.55 of the county tax, \$21.99 of the district school tax, \$8.62 of the tax of the village of Golden and \$277.90 of the road and bridge tax of the various townships. The objections to these various amounts are, that they are in excess of the maximum amount allowed by law; that the statutes under which the valuations were made and equalized are unconstitutional and void, and because the county board, at its September session in 1903, did not determine the amounts of all taxes to be raised for county purposes, nor any or either of them, and did not state separately the amounts to be raised for each purpose.

The objections were submitted to the court upon an agreed state of facts, the material parts of which are as follows: (1) That appellant is the owner of certain railroad property in said county, all of which was listed for taxation for the year 1903; (2) that the county tax levy was made at the rate of seventy-five cents on each \$100 of valuation, upon a total valuation of \$12,445,418; (3) that this valuation is the sum of the total valuation as fixed by the county board of review, together with the total valuation of all railroad property and capital stock as fixed by the State Board of Equalization; (4) that the total value of all of appellant's property assessed for the year 1903 in the county, as fixed by the State Board of Equalization, was \$631,165; (5) that the total county tax levied and assessed against appellant's property, and for which judgment was asked, was the sum of \$4733.91, and that the assessment was levied at the rate of seventy-five cents on each \$100 of the said \$631,165; (6) that the total valuation of all property in said county as equalized by the State Board of Equalization was \$11,184,628, and that a tax of seventy-five cents on each \$100 of this valuation would produce the sum of \$83,884.71; (7) that in order to produce a tax aggregating the sum of \$83,884.71 on the valuation aforesaid, of \$12,445,418, as fixed by the board of review, required a tax rate of sixty-seven and one-half cents on each \$100 of the aforesaid total valuation of

\$12,445,418; (8) that the county tax of \$4733.91 assessed against appellant's property exceeded the rate of sixty-seven and one-half cents on each \$100 of valuation of the aforesaid total of \$12,445,418, and that the amount of such excess is \$473.55; (9) that the total amount of taxes for all purposes levied and assessed against appellant's property, and for which judgment was asked, was the sum of \$22,970.37, and that the sum last aforesaid included the county taxes, amounting to \$4733.91; (10) that on April 29, 1904, appellant tendered to the county collector the sum of \$22,188.31, which was all the tax levied or assessed against its property except the sum of \$473.55 of county tax, and except, also, the several amounts assessed for road and bridge taxes, district school taxes and village tax above enumerated, which tender was then and there refused by the county collector for the reason that it did not include all of the taxes assessed against the appellant, and that appellant has duly brought this sum into court as a tender.

In addition to this agreed state of facts the county clerk identified the order of the board of supervisors made at its September meeting, 1903, levying the tax for county purposes, and he also testified to various facts not necessary to be here recited. All of the objections were overruled and judgment and order of sale entered. From this judgment an appeal has been prosecuted to this court.

JOSEPH N. CARTER, and MATTHEW F. CARROTT, (CHESTER M. DAWES, of counsel,) for appellant:

The county tax levied by the board of supervisors at its September meeting, 1903, for county purposes, on appellant's property, was to the extent of \$473.55 (the amount objected to) in excess of the maximum amount allowed by law, and said excess was and is therefore illegal, and it was manifest error in the county court to include the same in the judgment. Laws of 1901, p. 272; Const. 1870, art. 9, sec. 8; Rev. Stat. chap. 34, secs. 24, 27.

The act of May 10, 1901, amending sections 117 and 128 of the general Revenue law, and the act of May 9, 1901, prescribing the rule by which the maximum amount of any tax levied under any statute of the State can and must be determined, are *in pari materia* and must be construed together. So construed and as to give the intended effect to each there is no conflict between them, but they are in perfect harmony one with the other. Laws of 1901, pp. 271, 272; *South Park Comrs. v. Bank*, 177 Ill. 234; *Northern Trust Co. v. Palmer*, 171 id. 387; *Railway Co. v. Chicago*, 148 id. 516.

The levy of said county tax was wholly illegal and void, because it was not made in accordance with law but in direct violation of the statute. Rev. Stat. chap. 120, sec. 121; *Railway Co. v. People*, 205 Ill. 582; *Railway Co. v. People*, 207 id. 312; *People v. Railroad Co.* 194 id. 51; *People v. Railroad Co.* 193 id. 364; *People v. Glenn*, 207 id. 51.

JAMES N. SPRIGG, for appellee:

The appellant company's property is taxed only at the rate of seventy-five cents on each \$100 valuation on original assessment by the State Board of Equalization. This much the constitution expressly authorizes. (Const. 1870, art. 9, sec. 8.) The statute also authorizes it in the same words. Rev. Stat. chap. 34, sec. 24, clause 6.

Senate Bill No. 214, commonly called the "Juhl Bill," (Laws of 1901, p. 272,) should be read side by side with section 49 of the new Revenue law of 1898. The Juhl Bill is an attempt to re-enact, substantially, said section 49, and is unconstitutional. *People v. Knopf*, 183 Ill. 418; *Knopf v. People*, 185 id. 25; *Devine v. Board of Comrs.* 84 id. 590.

Where the unconstitutional portion of a statute induced the passage of the remainder of the chapter, it invalidates the entire act. *State v. Poynter*, 81 N. W. Rep. 431; *In re Day*, 181 Ill. 74.

The law does not require a tax levy for "county purposes" to be itemized. *Mix v. People*, 72 Ill. 241.

"County purposes" means one purpose, viz., for payment of county charges, imposed by law upon a public corporation of authority specially limited to the powers granted and burdens imposed by law.

Mr. JUSTICE WILKIN delivered the opinion of the court:

It is first insisted that the county tax as levied by the board of supervisors at its September meeting, 1903, was to the extent of \$473.55,—the amount objected to,—in excess of the maximum allowed by law, and was to this extent illegal and void; that the same error was committed in regard to the road and bridge taxes, the school tax and the corporation tax of the village of Golden.

The levy for county purposes as made by the supervisors is as follows:

"BY THE FINANCE COMMITTEE.

"To the Board of Supervisors:

"GENTLEMEN:—We, your finance committee, in the exercise of the powers conferred by law on county boards for that purpose, find that the necessary expenditures of the county of Adams for the current year, in the discharge of the obligations imposed upon said county by law, will require a sum of money to be collected by general taxation equal to seventy-five cents on the \$100 valuation of the taxable property of this county, and recommend the adoption of the following order: That there be and is hereby levied for the expenditures of the current year for county purposes, a tax of seventy-five cents on the \$100 valuation, and at that rate upon all property within the county of Adams as shown by the assessed and equalized valuation thereof as assessed by the Adams county board of review, and upon all property within said county as originally valued and assessed by the State Board of Equalization for the year 1903 for the purpose of taxation, and that the county clerk be and is hereby instructed to extend the said rate of seventy-five cents on each \$100 valuation in accordance with this order. Adopted."

This order of the county board directed the clerk to levy seventy-five cents, the highest rate allowed by law, on each \$100 of the valuation made by the county board of review. It is insisted by the appellant that by extending seventy-five cents on \$12,445,418, the valuation fixed by the board of review, a county tax of \$93,340.63 was produced, and that

by levying such tax of seventy-five cents on the valuation of the State board, which amounted to \$11,184,628, a county tax of only \$83,884.71 would have been produced, and that this is the maximum amount of taxes for county purposes which could have been lawfully assessed, and was to the extent of \$9455.93 in violation of the statute, and of this amount \$473.55 was assessed against appellant's property. Each objection as to the road and bridge tax, district, school tax and village tax is based upon the same limitation. The question for determination therefore is, whether these taxes, being the maximum provided by law, should be extended upon the basis of assessment as made by the board of review or by the State Board of Equalization.

Section 8 of article 9 of the constitution provides: "County authorities shall never assess taxes, the aggregate of which shall exceed seventy-five cents per \$100 valuation, except for the payment of indebtedness existing at the adoption of this constitution, unless authorized by a vote of the people of the county." It is not contended that there was any indebtedness in Adams county at the date of this levy which had existed at the adoption of the constitution, and therefore, under this provision, it is conceded that for county purposes the rate of taxation should not exceed seventy-five cents on the \$100. Under this constitutional provision section 121 of chapter 120 was enacted, authorizing the county board, at its September session, to determine the amounts of all taxes to be raised for county purposes, the aggregate amount of which shall not exceed the rate of seventy-five cents on the \$100 valuation of property, and order a levy made for that amount. There is nothing in the constitution which provides the method by which the assessment shall be made, and this is therefore left to the General Assembly to govern by proper laws.

On May 10, 1901, an act of the General Assembly was approved amending sections 117 and 128 of the general Revenue law, (Laws of 1901, p. 272,) as follows:

"Sec. 117. All rates for taxes, hereinafter provided for, shall be computed by the county clerk on the assessed valuation of property, as equalized and assessed by the State Board of Equalization for State purposes, and on the assessed valuation of property, as equalized and assessed by the county board of review, and all property assessed by the State Board of Equalization for other taxes.

"Sec. 128. State, county, town, road and bridge, village, city, district, school and all other taxes. All State taxes shall be extended by the respective county clerks upon the property in their counties upon the valuation produced by the equalization and assessment of property by the State Board of Equalization. All other taxes shall be extended upon the valuation produced by the equalization and assessment of property by the county board of review, and all property originally assessed by the State Board of Equalization. In the extension of taxes the fraction of a cent shall be extended as one cent."

There is nothing in either one of these sections which attempts to prescribe a limitation upon taxation. The limitations are provided by other sections of the statute and by the constitution. In view of the fact that there were two valuations established, it was necessary to fix a maximum amount which should not be exceeded.

May 9, 1901, an act concerning the levy and extension of taxes was approved, (Laws of 1901, p. 272,) as follows:

"Section 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly:* That in determining the amount of the maximum tax authorized to be levied by any statute of this State, the assessed valuation of the current year of the property in each taxing district, as equalized by the State Board of Equalization, shall be used. And if the amount of any tax certified to the county clerk for extension shall exceed the maximum allowed by law, determined as above provided, such excess shall be disregarded, and the residue only treated as the amount certified for extension.

"Sec. 2. The county clerk in each county shall ascertain the rates per cent required to be extended upon the assessed valuation of the taxable property in the respective towns, townships, districts, incorporated cities and villages in his county, as equalized by the State Board of Equalization for the current year, to produce the several amounts certified for extension by the taxing authorities in said county, (as the same shall have been reduced as hereinbefore provided in all cases where the original amounts exceed the amount authorized by law.)" * * *

By the above enactment it was evidently the intention of the General Assembly to designate which of the valuations should be the one upon which the seventy-five per cent limit should be estimated. All of the taxes in question being up to the limit provided by law, it was the duty of the county clerk to extend them upon the equalized valuation made by the State board, and not upon the valuation as made by the board of review. The amount of tax, in each case, in excess of the limit provided by law for county, road and bridge, district, school and village taxes estimated on the equalization of the State board was illegal and void, and the court should have sustained the objections of appellant.

We have in this connection given due consideration to the argument of counsel for appellee to the effect that the law referred to by counsel as the "Juhl law," approved May 9, 1901, is unconstitutional and void, and we are clearly of the opinion that the sections above quoted are not, in any view of the case, subject to the objection. Whether or not the other parts of the act are unconstitutional we need not now determine, further than to hold that they are not so connected with sections 1 and 2, *supra*, as that the latter could not be maintained even though other parts of the act were held void.

It is next insisted that the entire levy for county purposes, as made by the board of supervisors at its September meeting, 1903, was illegal and void, first, because it undertook to

prescribe a rate,—and that, too, on the wrong valuation,—and did not certify any amount to the county clerk for extension; and second, because the board of supervisors did not state separately the amount of tax required for each county purpose.

Section 121 of the Revenue act is as follows: "The county board of the respective counties shall, annually, at the September session, determine the amounts of all taxes to be raised for county purposes, the aggregate amount of which shall not exceed the rate of seventy-five cents on the \$100 valuation of property, except for payment of indebtedness existing at the adoption of the present State constitution, unless authorized by a vote of the people of the county. When for several purposes, the amount for each purpose shall be stated separately." (Hurd's Stat. 1903, p. 1529.)

The order of the county board levying this tax has been set out in full in the forepart of this opinion. The levy is made for the full limit as provided by law,—seventy-five cents on the \$100 valuation,—and orders the county clerk to extend the taxes on the equalized assessment as made by the board of review. We have held in many cases that a grant of power to levy taxes must be strictly construed and that the methods prescribed by the legislature must be substantially followed, and that a failure to comply with statutory requirements is not a mere irregularity, but is a fatal omission, which vitiates the tax. *People v. Atchison, Topeka and Santa Fe Railway Co.* 201 Ill. 365; *Chicago and Alton Railroad Co. v. People*, 190 id. 20; *Cleveland, Cincinnati, Chicago and St. Louis Railway Co. v. People*, 205 id. 582; *People v. Glenn*, 207 id. 50.

The section of the statute under which this tax was levied has never been before us for consideration, but many other statutes of similar import have been passed upon with reference to city and village taxes, school taxes, road and bridge taxes and township taxes, and we have uniformly held that where there were provisions of the statute requir-

ing the specific items for which a tax was levied to be stated in the levy, together with the amount of each, such provisions were mandatory and were necessary to a valid levy. (*Cincinnati, Indianapolis and Western Railway v. People*, 207 Ill. 566; *People v. Chicago and Alton Railroad Co.* 194 id. 51; *Cleveland, Cincinnati, Chicago and St. Louis Railway Co. v. People*, *supra*; *People v. Glenn*, *supra*; *People v. Chicago and Alton Railroad Co.* 193 Ill. 364.) The provisions of the statute in question are substantially the same as similar statutes which have been construed, and to say that a levy made in gross amount for all county purposes was valid, would be equivalent to giving no effect to that provision of the statute requiring the amount for each purpose to be stated separately. It is not sufficient answer to say that the provision is useless and unwise. We have nothing to do with these questions. It is only for us to say whether the sections of the statute require the levy to be in separate items. This requirement gives the tax-payer an opportunity to know for what purpose taxes are being levied and collected, and gives him an opportunity, if necessary, to prevent unjust levy and assessment. Taxes raised for county purposes include many different things, and these various amounts and purposes can be ascertained by the county board the same as they are ascertained by other taxing bodies.

We do not think the levy as made for county purposes was in compliance with the statute, and the court committed error in refusing to sustain the objection. *Cincinnati, Indianapolis and Western Railway Co. v. People*, (*ante*, p. 197.)

The judgment of the county court will be reversed and the case remanded for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

HENRY H. GAGE

v.

THE PEOPLE *ex rel.* John J. Hanberg, County Treasurer.*Opinion filed December 22, 1904—Rehearing denied Feb. 9, 1905.*

1. SPECIAL ASSESSMENTS—*when first step for letting contract will be presumed to have been in time.* In the absence of evidence showing the date of the last day of the February term at which a special assessment was confirmed, it will be presumed, where the advertisement for bids was published on June 6, that the first step for letting the contract was taken within ninety days from said last day.

2. SAME—*objection that second advertisement for bids was not in time not good on application for sale.* An objection that the second advertisement for bids was not published within ninety days from the time the first bids were rejected is not good, on application for judgment of sale, in the absence of proof of resulting injury, since the property owner has other remedies to compel the board of improvements to let the contract as required by law.

3. SAME—*when omission of dollar-mark renders judgment uncertain.* Omission of the dollar-mark before the figures opposite the description of the property in the schedule attached to a judgment of sale renders the judgment defective for uncertainty. (*Gage v. People, ante*, p. 347, followed.)

4. SAME—*when jurisdictional clause of judgment of sale may be omitted.* The clause in the statutory form for a judgment of sale, reciting due service of notice, may properly be omitted from a judgment of sale where the objectors appeared personally in court.

APPEAL from the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

F. W. BECKER, for appellant.

WILLIAM M. PINDELL, (EDGAR BRONSON TOLMAN, Corporation Counsel, and ROBERT REDFIELD, of counsel,) for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

The county collector of Cook county made application to the county court for judgment and order of sale against the appellant's property for a delinquent installment of a special

assessment for a sewer in Ravenswood Park avenue, in the city of Chicago. Appellant filed objections, which were overruled and judgment and order of sale rendered.

It is first insisted that the contract for the improvement was not let within the time provided in sections 74, 75, 76 and 77 of the Local Improvement act of 1897, as amended in 1901. These several sections provide, in substance, that all contracts for the making of any public improvement, when the expense thereof shall exceed \$500, shall be let to the lowest responsible bidder, in the following manner: Within ninety days after the term of court at which the judgment of confirmation has been made, if there be no appeal, steps shall be taken to let the contract for the work, as follows: First, an order to advertise for bids shall be entered by the board of local improvements in their records; second, a public notice shall be published that bids will be received; third, there shall be an examination and public declaration of the bids; fourth, the awarding the contract shall be made within twenty days after the time fixed for receiving the bids, and if no award be made within that time, another advertisement for bids shall be made as in the first instance. This record does not show the date of the last day of the February term, 1902, of the county court of Cook county, at which the roll was confirmed. That term might have continued until the 8th day of March. The order to advertise for bids was entered by the board of local improvements on June 4. The advertisement calling for the bids was first published June 6, 1902. In the absence of evidence to the contrary we will presume that the first step to let the contract was taken within ninety days after the expiration of the March term at which the judgment of confirmation was entered.

The bids were opened on June 19, which was within twenty days prescribed by section 77. All bids were rejected on that day and an advertisement for new bids was published October 24, 1902. The bids were opened November 6

and the contract awarded on November 10. It is insisted by appellant that the contract is illegal because more than ninety days elapsed between the time the first bids were rejected and the time when the advertisement for bids was again published. Even if the contract was not awarded within the time provided by statute, that fact would not affect the jurisdiction of the county court to hear and determine the application of the county collector for judgment and order of sale. The county collector applied for a judgment and order of sale upon this assessment, which had been duly returned to him as delinquent by the city collector. No acts done by the board of local improvements would deprive the court of the power to enter a judgment and order of sale. This is a proceeding to determine whether the lands should be sold which were duly returned delinquent, and not to determine the legality of the acts of the board of local improvements in letting the contract. If appellant had reason to believe that the board of local improvements had not complied with the law, he should have availed himself of the proper remedy in apt time to compel the board to do its duty. (*Hamilton v. Lubukee*, 51 Ill. 415; *Bush v. Sherman*, 80 id. 160; *Givins v. People*, 194 id. 150.) In the latter cause objection was filed to the application for sale, and the point was raised that the contract was not regularly and legally let, and we there said (p. 153): "It must be remembered the ordinance providing for the making of the improvement, and all of the proceedings under the ordinance save the letting of the contract to do the work, are regular and valid. The ground of objection to the payment of the benefits * * * is that the acts and conduct of the bidder previous to * * * the letting of the contract * * * was such as to limit the number of bids * * * and enable the successful bidder to receive a better contract than he otherwise might have been able to obtain. The proffered testimony did not tend to show that the amount to be paid for the work under the letting * * * was more than a fair contract price

therefor. * * * If a bid is accepted by the board of local improvements, still, if the causes stated authorizing its rejection existed, it may be avoided by the property holder whose interests are prejudiced thereby, if such property holder seasonably takes action to have the bid declared invalid. * * * The bid and contract are not void, but voidable, and may be enforced against the bidder. The option to have the bid and contract rejected or avoided is with the property owner, and he cannot be permitted to withhold his objection until he shall have secured the benefit of the work, labor and materials of the contractor, and then ask to be relieved of all liability to pay therefor." There is nothing in the record to show that appellant was in any way injured by the contract, and if he had been, he had adequate remedy under the statute, and it was his duty to act promptly. Section 80 of chapter 24 (Hurd's Stat. 1903, p. 409,) provides that the owners of a majority of the frontage may take the contract from the successful bidder if they think they can profit by so doing. The appellant could have availed himself of this provision, or he could have objected to the board of local improvements on the ground that the contract was not let within the time authorized by law, or he could have made the objection in the county court at the time the board of local improvements filed their petition for a hearing, after the completion of the work. Having failed to take advantage of any of these opportunities and having received the benefit of the work, and in the absence of any proof of injury, the county court committed no error in overruling the objection.

It is next insisted that the judgment and order of sale is defective, in that it fails to show the amount for which the judgment is rendered and orders a sale of the property *en masse*, and omits the jurisdictional clause, as provided in the statute. The recital of the judgment as to the amount is as follows: "Judgment is entered against the lots as described in the objections filed herein and as set forth in the attached schedule, which is made a part of this order, * * *

for the sum annexed to each, being the amount of the special assessment and cost due and unpaid, severally, thereon." In the schedule attached, appears the proper description of appellant's lots, with the figures 89.35 opposite each. The objection is, that the dollar-mark does not precede these figures, and it is therefore impossible to tell, from the judgment, what the figures mean. We have held in another case between the same parties at the present term (*Gage v. People, ante*, p. 347,) that the judgment is defective in that regard.

As to the objections that the judgment orders a sale of the property *en masse* and omits the jurisdictional clause, as provided in the statute, it is sufficient to say the objections are not sustained by the evidence. The property is ordered sold as provided by law, and the jurisdictional clause was omitted, no doubt, for the reason that the objectors personally appeared in court, and therefore the recital of service was unnecessary.

For the reason indicated, the judgment of the county court will be reversed and the cause will be remanded to that court with directions to correct its judgment.

Reversed and remanded.

JOHN J. MORRISON

v.

THE AUSTIN STATE BANK.

Opinion filed December 22, 1904—Rehearing denied Feb. 8, 1905.

1. APPEALS AND ERRORS—*court does not consider questions upon agreement of parties.* An agreement of the parties that the right of appellant to appeal shall be submitted to the court of review does not authorize a consideration of that question, where appellee does not assign cross-error nor make a motion to dismiss the appeal.

2. SAME—*when party cannot assign error upon a matter which might have rested in proof.* If the parties to a suit agree, by stipulation, that no advantage shall be claimed from the absence of proof

from the record, the appellee cannot urge as error that appellant's right to appeal does not appear from the recitals of the decree, since that right may have been shown by proof.

3. *PARTNERSHIP—interest of partners in firm property is neither joint nor in common.* While partnership property has many of the characteristics of estates in common and in joint tenancy, yet the interest of the partners in the firm property is neither that of joint tenants nor of tenants in common, but is *sui generis*.

4. *SAME—what is required of persons dealing with partnerships.* Persons dealing with a partnership are required to take notice of the partnership, the identity of its members, its business and the general course of that business.

5. *SAME—one aiding partner to defraud firm can receive no benefit.* A partner who disposes of firm property for his own benefit alone perpetrates a fraud upon the partnership, and if the party dealing with him knows that such is to be the result he can receive no benefit from the transaction.

6. *SAME—when a transaction with partner is voidable.* One who knowingly receives partnership property from a partner for a past debt owing by the partner individually, knows that he is perpetrating a fraud upon the partnership, and the transaction, in such case, is voidable.

7. *SAME—effect where property disposed of in fraud of partnership is negotiable.* If the partnership property received by a person from a partner in satisfaction of a past individual debt of such partner consists of instruments negotiable under the law merchant, an innocent purchaser thereof for value will obtain a good title.

8. *BILLS AND NOTES—city warrant against a special assessment fund is not negotiable.* A municipal warrant issued against a special assessment fund in favor of the contractor is not negotiable in the sense that it is entitled to protection under the law relating to bills and notes. (HAND, J., dissenting.)

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. AXEL CHYTRAUS, Judge, presiding.

This is an appeal from a judgment of the Appellate Court for the First District affirming a decree rendered by the superior court of Cook county on an intervening petition filed by the appellee in an equitable action brought by the appel-

lant, John J. Morrison, and James D. Morrison and William Sullivan, against one George I. O'Brien.

The original bill was brought by the appellant, John J. Morrison, and James D. Morrison and William Sullivan, against George I. O'Brien, setting up that said four parties had constituted a partnership under the firm name of John J. Morrison & Co. & O'Brien, and that said O'Brien had collected and converted to his own use certain assets of the partnership, viz., certain warrants issued to the partnership by the town of Cicero, and praying for an accounting and the appointment of a receiver. A receiver was appointed, and served notice upon the town of Cicero that said warrants belonged to said receiver and should be paid to none other. Thereupon the appellee herein, which had in the meantime acquired possession of said warrants in the manner hereinafter described, filed its said petition for an order commanding said receiver to withdraw said notice. A hearing was had on said petition and a decree rendered in favor of the appellee. The question as to the ownership of these warrants was the only one to be determined, so that the decree rendered on said petition practically decided the entire cause. After the rendition of said decree an order was made by the superior court finding that the appellant and James D. Morrison and William Sullivan were interested in said decree so as to be entitled to appeal therefrom, either jointly or severally, and authorizing such joint or several appeal. Thereafter the appellant herein duly perfected his separate appeal to the Appellate Court, from which he has also duly perfected his separate appeal to this court. Neither of the other parties has appealed. The appellant and appellee thereafter stipulated that the record in the cause on appeal to the Appellate Court and the Supreme Court should consist of the decree, the order authorizing the appeal by the appellant and the stipulation, and that the facts shown by the recitals in the decree were true. It was agreed by the stipulation that the case should be submitted to the upper courts on the ob-

jection of the appellee to the appellant's right of appeal, and upon the objection of appellant to the correctness of the decree on the facts as therein recited.

The admitted facts presented by the decree are, that George I. O'Brien, a partner of the firm of John J. Morrison & Co. & O'Brien, did on the 27th day of February, 1901, on behalf of and as a partner in said firm, receive from the town of Cicero, a municipal corporation, certain vouchers or warrants amounting to the sum of \$2208.10, and being in the form following:

This warrant is payable only from the special assessment named when collected.

"COOK COUNTY, ILLINOIS,
Town of Cicero.

No.

CLERK'S OFFICE, AUSTIN, Feb. 21, 1901.

Treasurer Town of Cicero:

Pay to John J. Morrison Co. & O'Brien the sum of
.....dollars for bal. on cement walks.....out
of the appropriation for the special No. fund only.
And charge same to the appropriation for said fund.
(\$.....)

I hereby certify that the above bill was ordered
paid by the board of trustees of the town of Cicero.

Countersigned,

Signed,

J. E. TRISTRAM,

Town Clerk."

JOHN I. JONES,

Pres't Town of Cicero.

It is also admitted that these vouchers were executed and issued by said town of Cicero for work done and material furnished by said firm of John J. Morrison & Co. & O'Brien under written contracts made by said firm and its assignors with the town of Cicero for the laying of cement sidewalks; that after receiving said vouchers or warrants aforesaid the said George I. O'Brien endorsed them and delivered them to his father, Thomas O'Brien; that such endorsement and delivery were without any express authority from his co-partners, and that his co-partners, and the receiver thereafter appointed of such co-partnership assets, repudiated the action of said George I. O'Brien in making such endorsement and delivery when the same became known to them;

that the sole consideration for the said endorsement and delivery was a past due indebtedness of George I. O'Brien to his said father, Thomas O'Brien; and that the said Thomas O'Brien was acquainted with the affairs of the said co-partnership of said John J. Morrison & Co. & O'Brien, and was chargeable with knowledge that the said warrants were the property of said John J. Morrison & Co. & O'Brien; that Thomas O'Brien endorsed the said warrants and delivered them to the Austin State Bank, the appellee herein, and received in payment therefor the sum of \$2053.90, which he kept and applied to his own use, and that neither the said firm nor its receiver has ever received any part thereof or derived any benefit from said payment; that the Austin State Bank received the warrants in the usual and ordinary course of business for the valuable consideration aforesaid; that it had no notice, information or knowledge, except as derived from the face of the said warrants, of any claim, of any nature, of any other person to said warrants, or that the said firm of John J. Morrison & Co. & O'Brien was in the hands of a receiver, or that Edwin J. Zimmer had been appointed such receiver, or that litigation was then pending; that on the 11th day of October, 1901, the receiver, Zimmer, served notice on the treasurer of the town of Cicero claiming the moneys represented by the warrants above described, and that on December 20, 1901, the Austin State Bank, appellee herein, presented the warrants to the said treasurer for payment and payment was refused.

Appellant has assigned a number of errors, but the principal one is that the court erred in holding that the vouchers and warrants in question, and the moneys represented thereby, were not the property of the partnership and should be delivered to the receiver.

JAMES A. BRADY, for appellant:

The transfer of partnership property by one partner in payment of his individual debt passes no title. *McNair v.*

Platt, 46 Ill. 211; *Rainey v. Nance*, 54 id. 29; *Buchanan v. Meisser*, 105 id. 638; *Harts v. Byrne*, 31 Ill. App. 260.

This is so even though the transferee had no notice of any of the facts and acted in absolute good faith. *Brewster v. Mott*, 4 Scam. 378; *Rogers v. Batchelor*, 12 Pet. 221; *Cannon v. Lindsey*, 85 Ala. 198; *Buck v. Moseley*, 24 Miss. 170; *Ackley v. Stachlin*, 56 Mo. 558; *Geery v. Cockroft*, 33 N. Y. Sup. Ct. 147; *Purdy v. Powers*, 6 Pa. 492; *Bank v. Campbell*, 75 Va. 34.

Municipal warrants, such as are involved in this case, are choses in action. 21 Am. & Eng. Ency. of Law, (2d ed.) 26; 6 id. 4; *People v. Johnson*, 100 Ill. 537; *Sheldon v. Sill*, 8 How. 441.

Choses in action are of two classes as regards defenses to them: negotiable and non-negotiable. In the negotiable class belong bills of exchange and promissory notes, with various other instruments held to be promissory notes under the Illinois negotiable instrument statute; in the non-negotiable class belong municipal warrants, such as are involved in this case, and all other choses in action. 2 Am. & Eng. Ency. of Law, (2d ed.) 1084; 21 id. 26; *Newell v. School Directors*, 68 Ill. 514; *School Directors v. Fogleman*, 76 id. 189; *People v. Johnson*, 100 id. 537.

Municipal warrants, as non-negotiable choses in action, as regards defenses to them, have been universally held only transferable subject to all equities existing in favor of the debtor party. 21 Am. & Eng. Ency. of Law, (2d ed.) 26; *Newell v. School Directors*, 68 Ill. 514; *School Directors v. Fogleman*, 76 id. 189; *People v. Johnson*, 100 id. 537.

CASTLE, WILLIAMS & SMITH, (BEN M. SMITH, of counsel,) for appellee:

An innocent *bona fide* purchaser without notice and for a valuable consideration, in the usual and ordinary course of business, will be protected. *Choteau v. Jones*, 11 Ill. 300; *Fox v. Peck*, 15 id. 226; *Lyons v. Robbins*, 46 id. 276; Rail-

road Co. v. Phillips, 60 id. 190; *Hecker v. Monroe*, 176 id. 384.

The partners in this case are estopped from denying the right of O'Brien, one of the partners, to sell partnership property and receive the payment therefor in the usual and ordinary course of business. Mechem on Partnership, sec. 186; Mechem on Sales, secs. 144, 159, 170, 946; Pomeroy's Eq. Jur. secs. 710, 712.

Morrison, personally, has no right to appeal. *Marvin v. Collins*, 98 Ill. 510; *Gogan v. Burdick*, 182 id. 126.

Mr. CHIEF JUSTICE RICKS delivered the opinion of the court:

Appellee, by its brief, questions the right of John J. Morrison, the appellant, to prosecute this appeal, and that question will first receive our consideration.

The record was made up by a stipulation of the parties, in which it was agreed that the record should consist of the decree of the superior court, the order of court granting the appeal, and the stipulation. It is also agreed "that the record, pleadings and proof in such case is hereby waived, and no exception, benefit or advantage shall be taken by either party hereto to the same." It is also agreed that the objection of appellee that appellant has not the right of appeal, and the objection of the appellant to the correctness of the decree on the facts, are submitted to the consideration of the Appellate Court, and in case of an appeal to this court the same questions shall be presented.

We think appellee's contention should be denied for two reasons. Appellee did not assign cross-error in the Appellate Court or in this court, nor did it make a motion in this court to dismiss the appeal upon the ground stated. Parties may agree upon the questions they will present to the court upon the record and they will be confined to them, but the court does not consider error upon the mere agreement of the parties. Notwithstanding the agreement, the errors re-

lied on must be assigned. The Appellate Court took jurisdiction of the cause and disposed of it upon its merits.

The decree is not predicated upon the ground that John J. Morrison, the appellant, had no interest in the subject matter, but that the better right to the property in question was in the appellee, so that there is nothing appearing in the facts of the decree which tends to show that Morrison was not interested. On the contrary, the facts and recitals in the decree tend to show he was interested in the subject matter.

Appellee recites and relies upon *Gogan v. Burdick*, 182 Ill. 126, from which it quotes: "The settled rule is, that a party in whose favor a decree granting relief is rendered must sustain it by specific facts which justify it, either recited in the decree as proved on the hearing and found by the court, or by preserving the evidence establishing such facts." It may be first noted that the rule there cited is applicable only to the person in whose favor the decree is granted; but if it be held applicable to both of the parties, then it is further seen that the fact may appear by recitals in the decree or the proof at the hearing. In this case it is expressly stipulated that upon any matter of proof no exception, benefit or advantage shall be taken by either party. Under the authority cited, the question here presented was one that might have appeared by the proof in the record if it did not sufficiently appear from the recitals in the decree, and as appellee agreed that it is to have no advantage because of the absence from the record of the proof, it cannot now be heard to urge error upon a matter that might have rested in proof.

The questions upon the merits of this case that are presented for our consideration, as we conceive them, are as to the rights and powers of a partner in reference to the partnership property, and the character of the instruments here in question. The latter question involves the determination of whether those instruments are negotiable within the meaning of the law merchant, so that the purchaser thereof may

take the same unaffected by the rights of the maker or intermediate holders.

The legal characteristics of partnership property, and the interests, powers and rights of the partners relative to the same, are peculiar, and cannot be well assimilated to any other class of property when viewed in its relation to its ownership. While it has many characteristics of estates in common and in joint tenancy, yet the interest of partners in the firm property is neither that of joint tenants nor that of tenants in common, but is *sui generis*. In *Taft v. Schwamb*, 80 Ill. 289, it is said (p. 300): "Each partner is possessed *per my et per tout*,—that is, by the half or moiety and by all,—or, in other words, each has a joint interest in the whole but not a separate interest in any particular part of the partnership property; and being so possessed, and because the title of partners is undivided, it follows that all have a moiety or the same species of interest in the stock in trade, whether each individual partner contributes exactly in the same proportion or not. But their several degrees of interest must be regulated according to the stipulated proportions and the different conditions of the partnership. To whatever share a partner may be entitled, in whatever sum the firm may be indebted to him, he has no exclusive right to any part of the joint effects until a balance of accounts be struck between him and his co-partners and it be ascertained precisely what is the actual amount of his interest." If he sell his interest in the partnership without the consent of his partner that the purchaser shall become a partner and succeed him in the partnership, the purchaser does not by his purchase become a partner, but simply becomes the owner of the proportion his vendor held in the partnership after the closing up of the partnership and the payment of the partnership debts. If a partner die, his heirs do not succeed to his rights as a partner nor to the partnership property,—and particularly so where it is personal property,—but the surviving partners hold all the property until the closing up and settlement of

the partnership, when the heirs succeed merely to the proportionate share of the remaining assets. These attributes of such property arise in a large degree from the existence of the situation of two or more persons having interests in the business, being clothed with power to conduct it. They owe fidelity to each other, and the firm, as such, owes good faith to the public, and it is in the adjustment of the respective rights and duties between the partners and the public that the qualities peculiar to this property are given it. Where a business is being conducted by a number of persons who are owners of that business, it is necessary that each of the persons so owning shall be invested with power to do all things in the regular, necessary and usual course of business, and when they do so it is necessary and proper that those who deal with them shall be protected. These considerations have led the courts to require of persons who deal with partnerships to take notice of the partnership, the identity of its members, the character of the partnership, its business and the general course of that business, as the public owes to the partnership the same fidelity, when dealing with its individual members, that the partnership owes to the public in such cases. Ordinarily partnerships are conducted for profit. The property of the partnership is usually sold for money and the money re-invested, and through these means the business is kept up. The return of sales received by each partner is for the partnership,—the result and representative of the partnership goods,—and is to be accounted for to the partnership or turned into it by the person who makes the sale. These matters are, and must be, known to all persons who deal with them. The partner who makes disposition of partnership goods that the benefit may come to him alone perpetrates a fraud upon the partnership, and the person who deals with him knowing that such is to be the result is a party to that fraud and can receive no benefit from it. When Thomas O'Brien, the father of George I. O'Brien, received from him the warrants or vouchers in question for the pay-

ment of money that belonged to the partnership, of which appellant was one, in payment of a past due debt to himself from his son and not from the partnership, he knew that his son was making a fraudulent use of the partnership property, and being a party to that fraud he did not and could not take anything by it. As between him and the partnership it was as though the transaction had not been made at all, or as though he had found or stolen the property acquired by him through such means. True it is that the public, in dealing with a partner in the regular course of business, is not required to see that the partner accounts for the funds received by him for the partnership property. If a purchase be made in good faith or an assignment of paper belonging to the partnership shall be made by one of the partners in the firm name for a cash consideration that is a fair equivalent for the property, or under such circumstances that the purchaser is not chargeable with notice of the fraudulent purpose of the partner who is making the disposition, then the purchaser is not required to see that the partner does account to the partnership for the proceeds thus obtained by him; but when a partner disposes of the property of the partnership and obtains nothing, he can return nothing to the partnership, and one so dealing with a partner cannot shut his eyes to the transaction and say that he is innocent of any wrongful intention toward the partnership, and one who receives the partnership property from one partner for a past due debt to himself from that partner knows that the partner is not receiving anything that can be shared with the partnership and knows that he is thereby working a fraud upon the partnership. The transaction may be ratified by the partnership and may be validated, as one may elect to waive a tort and proceed in assumpsit as for goods sold, but until, with a full knowledge of all the facts, the partnership has ratified the transaction it is voidable. When Thomas O'Brien received the orders from his son he knew the partnership was to receive nothing for them, and the transaction was

fraudulent and voidable. If, however, the instruments so obtained by him are negotiable in the sense that promissory notes and bills of exchange are under the law merchant, he might sell or dispose of them to an innocent purchaser for value, who would obtain a good title to them as against all the world.

We have looked to the act authorizing the issuance of these warrants or vouchers, and there is no provision found in it giving them the required characteristics of negotiability. We have looked to the statute in relation to negotiable instruments, and find that by sections 3 and 4 of chapter 98 certain instruments are mentioned and are given the quality of assignability by endorsement, so that they may be passed by assignment in writing in the same manner as bills of exchange are, "so as absolutely to transfer and vest the property thereof in each and every assignee successively." By section 5 it is provided that the assignee may sue in his own name and maintain the same kind of action that the original obligee or payee could have done; and section 7, which was section 1 of an act approved June 4, 1895, in relation to promissory notes, etc., (Laws of 1895, p. 262,) states just what instruments among all the instruments referred to in the act shall be clothed with the attributes of negotiability according to the custom of merchants, and by it those qualities are only extended to promissory notes payable in money, and it contains the further provision that the holder or owner of any other evidence of indebtedness mentioned in the act may sue the assignor when he has shown due diligence to collect from the maker. So it will be seen that neither by the act authorizing the issuance of the vouchers in question nor by our statute in regard to negotiable instruments are the instruments in question given the qualities necessary to protect appellee as an innocent purchaser, unless such instruments can be held to be promissory notes within the meaning of our act.

It seems to have been generally held that municipal corporations have no power, in the absence of an express grant,

to issue unimpeachable evidence of indebtedness, and so it was held in *Police Jury v. Britton*, 15 Wall. 566: "It is one thing for county or parish trustees to have the power to incur obligations for work actually done in behalf of the county or parish and to give proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable obligations, which may be multiplied to an indefinite extent." And in *Mayor v. Ray*, 19 Wall. 468, it is said: "Vouchers for money due, certificates of indebtedness for services rendered or for property furnished for the uses of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind used for liquidating the amounts legitimately due to public creditors, are, of course, necessary instruments for carrying on the machinery of municipal administration and for anticipating the collection of taxes; but to invest such documents with the character and the incidents of commercial paper, so as to render them in the hands of *bona fide* holders absolute obligations to pay, however irregular or fraudulently issued, is an abuse of their true character and purpose. It has the effect of converting a municipal organization into a trading company and puts it in the power of corrupt officials to involve a political community in irretrievable bankruptcy. No such power ought to exist, and in our opinion no such power does legally exist, unless conferred by legislative enactment, either express or clearly implied." The above cases are quoted and the subject ably discussed in the case of *State ex rel. v. Cook*, 61 N. W. Rep. (Neb.) 693.

In *Miner v. Vedder*, 66 Mich. 101, a suit was brought against the treasurer of a village upon a warrant, by the assignee thereof. The treasurer answered, among other things, that he had received notice from one Boies that the orders originally belonged to him and that the relator was not entitled to them. The court found that the relator was not the lawful holder and was not entitled to recover. Upon appeal, in discussing that phase of the case, the court said (p. 103):

"It was claimed upon the trial, and is argued here, that relator purchased the orders in good faith, for a valuable consideration, without notice of the mistake or lien claimed, and that therefore, being a *bona fide* holder of said orders, neither such mistake nor lien could be allowed or enforced as against him. It is sufficient to say, in answer to this argument, that these warrants or orders issued by the village of Hudson are not negotiable instruments, and while in the hands of the relator are subject to all the equities existing between the payee and the village, or between the payee and any other person, without reference to the good faith of the relator in his purchase."

This court, in *People ex rel. v. Johnson*, 100 Ill. 537, speaking of a county order, said (p. 546): "We regard the rule well settled, by considerations of public policy as well as by a decided preponderance of authority, that warrants or orders drawn by one municipal officer upon another, in the disbursement of the funds of the municipality and payment of its indebtedness, are not to be regarded as negotiable or commercial paper, cutting off equities against the corporation. As we have already seen, the official agents of these municipalities have no implied power to execute such paper, and to clothe these warrants or orders with the qualities and attributes of commercial securities would be to give them a character foreign to the object and purposes of their creation." In that case the case of *Garvin v. Wiswell*, 83 Ill. 215, in which a bond issued by a county to meet an appropriation to pay bounties for volunteers was held to be a negotiable instrument, is reviewed and distinguished, and attention is directed to the fact that the special act authorizing the issuance of bonds gave them the character of negotiable instruments. The court, in discussing it, said (p. 547): "The effect of this act was equivalent to a previous authority to issue the instrument, and gave to it, as was originally intended, all the attributes of commercial paper. That the legislature has ample power to authorize counties or other

municipalities to issue negotiable securities is not to be questioned, yet without such special legislative authority they have no power to do so, and there is no pretense that the order in this case was issued for any such purpose or was authorized by any special act of the legislature."

The case of *First Nat. Bank v. Gates*, 66 Kan. 505, (97 Am. St. Rep. 383,) is very similar in principle to the case at bar. There Gates gave to Blanchard a sum of money with which to purchase for him county warrants. Blanchard was cashier of the bank and Vawter was its president. Blanchard purchased the warrants and placed them in the bank for Gates. Vawter took the warrants and pledged them as security for a loan from the appellant, the First National Bank. Gates demanded the warrants and their delivery was refused and he sued for conversion. The court says: "The bank, however, claims that having taken this warrant in the usual course of business for a sufficient consideration, without knowledge of Vawter's wrong, it is entitled to be protected by the law merchant. The question is, therefore, is a county warrant, which is negotiable in form but non-negotiable in the sense that the county issuing it may defend against it, nevertheless negotiable as between successive holders, so that a thief may vest title to it in a *bona fide* taker of it? That one so acquiring ordinary commercial paper would be protected is not questioned. An innocent purchaser, in good faith, of commercial paper gets a good title, even though he purchase from a thief. (Citing authorities.) This is so because of the law merchant. * * * But paper non-negotiable for any reason is not thus protected. The very fact of its being non-negotiable is a sign of warning to the prospective purchaser and places him on his guard. Municipal warrants, though negotiable in form, are non-negotiable in fact, hence they are not within the protection of the rule which guards commercial paper." To the same effect is *Keller v. Hicks*, 22 Cal. 457; 83 Am. Dec. 78.

We think the above cases state a sound rule, and one which sound public policy and the greater weight of authority alike demand shall be adhered to.

There is another insuperable reason why the warrants here in question cannot be deemed or held to be commercial paper. They were given for work done under the Local Improvement act of 1897 and payable out of special assessments, and so state upon their face. By sections 73 and 90 of that act the contractor or other person holding such warrants has no claim against the municipality issuing them, other than the fund arising from the assessments that may be collected. "Instruments drawn upon a particular fund, whether the fund has already accrued or is to accrue in the future, are not negotiable bills or notes, since they do not carry the general personal credit of the maker and since they are contingent upon the sufficiency of the fund upon which they are drawn." (4 Am. & Eng. Ency. of Law,—2d ed.—87, and authorities there cited.) It is needless to extend this opinion or to further cite authorities upon this last proposition, as they are very numerous and entirely uniform.

The judgment of the Appellate Court and the decree of the superior court are reversed and the cause remanded to the superior court, with directions to that court to dismiss the intervening petition of appellee, and to make such order with reference to the ownership of said warrants as shall conform to this opinion and as justice and equity may require.

Reversed and remanded, with directions.

Mr. JUSTICE HAND, dissenting: I think the warrants in question were so far negotiable as to vest title in the Austin State Bank against all persons except the town of Cicero. To hold otherwise would be to impair the commercial value of such warrants, and increase the cost to the property owner of all local improvements in municipalities in this State.

WILLIAM JESPERSEN, Exr.

v.

JOHN MECH *et al.*

Opinion filed December 22, 1904—Rehearing denied Feb. 8, 1905.

1. **HOMESTEAD**—*homestead does not pass by deed not joined in by wife.* A deed to homestead premises by the husband not joined in by the wife, even though the deed is to the wife, passes only the excess in value over a homestead estate of the value of \$1000.

2. **SAME**—*when heirs are entitled to partition homestead estate.* The homestead estate to the value of \$1000 remaining in the grantor by reason of his wife's failure to join in the deed descends to his heirs-at-law, and may be partitioned by them upon the abandonment of the same by the widow and children.

3. **SAME**—*value of homestead estate is a fixed quantity.* The value of the homestead estate, created by our statute, is a fixed quantity, which does not increase or decrease in proportion to the increase or decrease in value of the homestead premises.

4. **SAME**—*excess is determined by value of premises at time of partition.* In a proceeding to partition an unreleased homestead estate among the heirs-at-law, the amount of the excess in value over the homestead estate is determined by the value of the homestead premises as of the time when partition is sought, and not as of the time when the conveyance was made which left the homestead unreleased.

5. **WIDOW'S AWARD**—*creditors cannot compel the allowance of widow's award.* While a widow's award may be reached by her creditors after its allowance, yet she cannot be compelled to assert her claim to the award for the benefit of her creditors, nor can they assert it for her.

6. **WAIVER**—*when claim that incompetency of evidence was waived cannot be urged.* A claim that the incompetency of hearsay evidence was waived by counsel for the heirs in a partition proceeding cannot be urged against the infant defendants.

7. **SOLICITORS' FEES**—*when allowance of solicitor's fee in partition is proper.* Allowance of a fee to complainant's solicitor in partition is proper where the interests of the parties were set forth correctly in the bill and were so found in the decree and no substantial defense was interposed.

8. **PARTIES**—*when party cannot complain that he was not made a party as administrator.* One who is made a party to partition

proceedings as trustee in a deed of trust cannot complain that he was not made a party as administrator, where his appointment was made pending suit and no application was made to make him a party in his capacity as administrator.

APPEAL from the Circuit Court of Cook county; the Hon. R. S. TUTHILL, Judge, presiding.

On August 5, 1903, appellees, as children and heirs of Johann Mech, filed their bill in the circuit court of Cook county to partition certain real estate in the city of Chicago known as No. 904 Wolfram street.

The facts upon which the bill is based are substantially as follows: Johann Mech was the owner of the real estate sought to be partitioned, on which he resided with his family as a homestead, and on March 20, 1893, he executed a quit-claim deed to the same to his wife, Marie Mech, but that deed was not signed by the wife. At the time of the conveyance the premises are now estimated to have been of the value of about \$3500. Johann Mech and his family continued to reside upon the premises until April 29 of the same year, when he died intestate, leaving surviving him his widow, Marie, and Arthur, John, Charles and Mary Mech and Emma Brischke, his children and only heirs-at-laws, all being then minors. The widow and children continued to reside upon the lot until some time during the year 1902, (about ten months before the filing of the bill,) when they abandoned the homestead permanently. On July 22, 1893, Arthur Mech, one of the children, died testate, leaving as his only heirs-at-law his said mother and brothers and sisters. In April, 1895, the widow was married to Herman Strelow, but she continued to reside in said homestead, and on December 19, 1895, she and her said husband conveyed all her interest in the property by a trust deed to Henry P. Kransz, as trustee, to secure an indebtedness of \$1600. On May 1, 1902, one Friedericka Hellmig, who was the owner of the indebtedness so secured, died, leaving a will, in which she

appointed the appellant herein as her executor. On June 15, 1903, prior to the bringing of this suit, he and the trustee, Kransz, filed a bill in the superior court of Cook county to foreclose said trust deed.

The bill for partition, in addition to the above stated facts, alleged that Emma Brischke, John Mech, Charles Mech and Mary Mech were each entitled to an undivided $7/30$ interest in fee in said estate of homestead of the value of \$1000; that Marie Strelow was entitled to the undivided $2/30$ interest in said estate of homestead, and in addition thereto was entitled to the full excess in value of said premises over and above the sum of \$1000, and she was also entitled to dower in the interests of Emma, John, Charles and Mary; that the trust deed was a lien on the entire interest of Marie Strelow and Herman Strelow, except the dower interest of said Marie, and the bill prayed for the assignment of dower and the making of partition.

Appellant, as executor of the last will and testament of Friedericka Hellmig, filed his answer, in which he admitted the allegations as to the ownership of the \$1600 note and trust deed, and alleged that at the date of the death of said Johann Mech said premises were worth \$3500, but had now depreciated in value and are not worth more than \$1500; alleged that on August 10, 1903, Henry P. Kransz was duly appointed administrator of the estate of Johann Mech, deceased; that on August 24, 1903, a widow's award for the sum of \$955 was duly allowed by the probate court of Cook county against the estate of Johann Mech, deceased, and in favor of his widow, Marie; that on the 25th day of August, 1903, the said Marie duly filed in the probate court her widow's election, electing to take the whole of said widow's award in money; that on August 27, 1903, appellant recovered a judgment by confession for \$1659.30 against the said Marie and Herman Strelow, and that on September 2, 1903, he filed in the superior court of Cook county a creditor's bill based on the aforesaid judgment, and on the same

day caused service of process in said last mentioned proceeding to be had upon H. P. Kransz, as administrator of the estate of Johann Mech; that on September 4, 1903, Marie Strelow filed in the probate court of Cook county a release and waiver of her widow's award against the estate of said Johann Mech; that there was no consideration for said release and that the same was executed with the sole design to defraud appellant; denied that the said Marie Strelow and Mary, Charles, John and Emma Mech were seized of any part of the estate of homestead in said premises, and also that Henry P. Kransz was a necessary party to said partition proceedings. Upon issue being joined the case was referred to a master, and upon hearing he made his report finding the facts substantially as alleged in the bill. Objections to his report being overruled, they were renewed by way of exceptions and overruled by the court. Upon a hearing a decree of partition was rendered as prayed. To reverse that decree this appeal is prosecuted.

IVES, MASON & WYMAN, for appellant.

C. H. SIPPEL, for appellees.

Mr. JUSTICE WILKIN delivered the opinion of the court:

The first ground of reversal insisted upon by counsel for appellant is, that the court erred in refusing to estimate the value of the homestead and the interest of Marie Strelow conveyed by said trust deed, upon the value of the premises at the time of the execution of the quit-claim deed by Johann Mech to his then wife. They state their proposition on this point as follows: "When Mech died seized of the fee to the extent of \$1000, which had not passed by reason of the defective deed made by him, that fee was encumbered by his homestead estate. But the homestead estate has been abandoned and become extinguished, so that it is no longer in existence. The question as to the proportionate shares of the

fee owned by the several parties interested therein at the present time must be determined by ascertaining the total value of the fee at the time of the conveyance by Mech, in 1893. As an interest in the fee to the extent of \$1000 remained in him, if the property was then worth \$3500, he was the owner of 10/35 and Mrs. Mech (now Strelow) of the remainder, or 25/35. Such would continue to be their respective proportionate interests, no matter whether the property subsequently increased or diminished in value. The decree appealed from, by confusing the homestead with the fee, has maintained an arbitrary value of \$1000 on the fee left by Mech, regardless of the depreciation in the value of the property since, leaving the surplus above \$1000, or 25/35 of the whole property, to bear the whole burden of depreciation in value to \$1500."

We are of the opinion that the position is wholly untenable. It is not correct to say that the \$1000 fee was encumbered by a homestead estate. The homestead itself was an estate in the premises "to the extent in value of \$1000." That is, the lot and buildings thereon owned by Johann Mech and occupied by him as a householder having a family, as his residence, exceeding in value \$1000, he was entitled to so much of said lot and buildings as would amount in value to \$1000. The part of the lot of land exempted as a homestead might be much or little, but such part, by the terms of the statute, must have been to the extent in value of \$1000. That exemption continued after the death of Johann Mech for the benefit of his wife and children so long as they continued to occupy the same or until the youngest child should become twenty-one years of age. That homestead right could only be released in the mode provided for in section 4 of the Homestead Exemption act, and whenever the premises, including the homestead, are sold or attempted to be conveyed without complying with that section, or whenever said premises are sold upon execution, the person having the homestead is entitled to an estate to be set off or allotted to

him to the extent in value of \$1000, if the premises exceed in value that amount.

An attempt by the husband to convey the homestead without his wife joining in the execution of the deed, if the premises exceed in value \$1000, as we have frequently held, conveys only the excess over and above the homestead of \$1000 in value. The title to the homestead to the extent in value of \$1000 in fee remains in him, and upon his death, and the abandonment of the same by the widow and children, descends to his heirs-at-law, and may be partitioned by them as in cases of any other inherited estate. The deed purporting to convey the premises being ineffectual except as to the excess, does not convey any definite or ascertained amount or quantity of the premises, but simply so much, if any, as exceeds in value the sum of \$1000, and that excess can only be ascertained when an attempt is made to set off or allot the homestead estate. The question was presented in the case of *Anderson v. Smith*, 159 Ill. 93. There, by the assignment of cross-errors the appellees sought to question the correctness of the decision of the circuit court "in fixing the quantity of land which they were entitled to, (*i. e.*, the homestead,) by the value then instead of when the father died," but we held that the commissioners were properly directed to set off the homestead on an estimate of the present value. This rule can work no hardship to either party. When Johann Mech made his deed to his wife, she, or those claiming under her, had the right to have the homestead then set off to her, and, of course, the value of the respective parties would then have been determined by the value of the whole premises. (*Hotchkiss v. Brooks*, 93 Ill. 386; *Cutler v. Cutler*, 188 id. 285.) On the other hand, the householder, or those claiming under him, could have maintained a suit for partition at any time after the execution of that deed. (*Anderson v. Smith*, *supra*; *Gray v. Schofield*, 175 Ill. 36.) Both parties, however, having been contented to hold those interests in common, they could only

be determined in value by the value of the whole premises at the time the partition was sought. A moment's reflection will, we, think, show the impracticability of any other rule. To sustain the contention of appellant it would be necessary to hold in every case that the value of the premises at the date of the conveyance was the basis upon which the division should be made. In this case, on the estimated value by appellant's counsel, the widow would get 25/35 and the heirs 10/35. No matter whether the value of the property increased or diminished, under that contention the relative shares of the respective parties would remain absolutely fixed. If they increased in value, the estate of the heirs, when set off, would amount, in value, to more than \$1000, whereas the statute is that they shall have a "homestead to the extent in value of \$1000." If, on the other hand, as is claimed in this case, the property has decreased in value, their homestead estate would be less than that amount in value. The law is well settled that where the premises do not exceed in value the sum of \$1000, a deed to the homestead not signed by the wife is a nullity and no title passes to the grantee, but where they do exceed in value that amount, the effect of the deed is to convey the excess over \$1000, and no more. (*Anderson v. Smith, supra*; *Dcspain v. Wagner*, 163 id. 598; *Kitterlin v. Milwaukee Mechanic's Ins. Co.* 134 id. 647; *Barrows v. Barrows*, 138 id. 649.) That excess is only so much as remains after setting off the homestead estate. The court below determined the interests of the parties on this theory, in doing which there was no error.

It is next insisted that the decree of the court below is erroneous for the following reason: "The allowance of the widow's award in favor of Marie Strelow against the estate of Mech, her former husband, constituted a lien in her favor upon the interest in said real estate left by Mech. Appellant, by obtaining judgment, filing a creditor's bill thereon and serving the administrator of Mech's estate, equitably garnisheed said claim of said Marie Strelow, and the court

should have so found." This position, we think, is wholly untenable. To re-call the facts bearing upon the question: The quit-claim deed was executed March 20, 1893. The husband died April 29, following. This bill for partition was filed August 5, 1903,—more than ten years after the execution of the deed and the death of the householder, during all of which time no steps were taken to administer upon the estate of Johann Mech. After the bill was filed, on August 10, 1903, Henry P. Kransz was, on his own motion, appointed administrator of that estate, and August 24, 1903, he procured a widow's award to be allowed to Marie Strelow, and her election to take the same in money, but shortly thereafter she filed a release and waiver of her award, which the court, on her showing that her election had been obtained by misrepresentations and fraud, allowed. The administrator appealed from that order and the appeal is still pending. Manifestly, the court below could not have found that the widow's award became a lien upon the homestead estate under this state of facts. There has been no allowance of the widow's award. The question of its allowance is still pending and undetermined in the circuit court. But the real contention of appellant seems to be that the decree of partition should have been postponed until his creditor's bill could be disposed of. It must be admitted that the administration upon the estate of Johann Mech was not for the purpose of settling his estate or obtaining the widow's allowance for her benefit, but to reach the homestead estate which had descended to the heirs, for the payment of the debt due from the widow and her husband. If the widow herself had attempted to administer upon her husband's estate more than ten years after his death, without any explanation for the delay and for the sole purpose of having her award set off and the homestead sold for its payment, she would clearly have been barred by her *laches*. Even if she had taken out letters of administration promptly upon his death and made no effort to have her widow's allowance set off until the lapse

of more than seven years, she would, under the repeated decisions of this court, by analogy of the lien of judgments and the limitations for entry upon and recovery of lands, have been barred. Certainly she, having the first right to administer upon her husband's estate, could not avoid the effect of those decisions by her unexplained delay in administering upon the estate for more than seven years. (*Furlong v. Riley*, 103 Ill. 628.) If the widow could not, under the facts of this case, obtain the allowance of her widow's award, manifestly her creditors cannot do so. The widow's award, under the statute, is for her benefit and that of her family, and while it may be reached by her creditors after it has been allowed, we know of no reason or authority for holding that she can be compelled to assert her claim thereto for the benefit of her creditors, and it is equally clear that her creditors cannot assert it for her.

In addition to what we have said, the proof offered before the master of the alleged proceedings in the probate court, etc., by the administrator, is incompetent and altogether unsatisfactory. It consisted of mere hearsay evidence, and while some contention is made that counsel for the heirs waive the incompetency of that testimony, such contention certainly cannot be made against the infant defendants.

Further objection is made by appellant to the allowance of a solicitor's fee to appellees' counsel. The decree rendered by the circuit court was in substantial conformity to the allegations of appellees' bill. The interests of the parties were correctly set up in the bill and were so found by the decree. No substantial defense was interposed by appellant, therefore there was no error in allowing a solicitor's fee to the appellees' solicitor. (Hurd's Stat. 1903, chap. 106, sec. 40, p. 1366.)

It is also insisted that Henry P. Kransz, as administrator of the estate of Mech, was a necessary party to this partition proceeding. Kransz is made a party as trustee under the trust deed, and at the time the bill for partition was filed

he was not administrator of the estate of Mech. There is nothing in the record to show that any application was made to the circuit court to make him a party after his appointment as administrator. He became administrator pending the suit, and as he was a party defendant in another capacity he has no grounds for complaint.

The decree of the circuit court will be affirmed.

Decree affirmed.

THE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY
v.

THE PEOPLE *ex rel.* O. L. McCord, County Treasurer.

Opinion filed December 22, 1904—Rehearing denied Feb. 9, 1905.

This case is controlled by the decision in *Chicago, Burlington and Quincy Railroad Co. v. People*, (*ante*, p. 458.)

APPEAL from the County Court of Vermilion county; the Hon. S. MURRAY CLARK, Judge, presiding.

H. M. STEELY, (W. H. LYFORD, and E. H. SENEFF, of counsel,) for appellant.

J. W. KEESLAR, State's Attorney, (W. T. GUNN, and SWALLOW & SWALLOW, of counsel,) for appellee.

Per CURIAM: All of the questions involved in this case are fully considered in the case of *Chicago, Burlington and Quincy Railroad Co. v. People*, (*ante*, p. 458,) and in accordance with the views therein expressed the judgment of the county court is reversed and the cause remanded.

Reversed and remanded.

WILLIAM LOHMEYER *et al.*

v.

ELIZA A. DURBIN.

Opinion filed December 22, 1904—Rehearing denied Feb. 9, 1905.

1. LACHES—*laches in asserting inchoate right of dower cannot be imputed.* During the life of the husband the wife's right to dower is a mere expectancy, which she cannot assert against him or any other person, and *laches* cannot be imputed to her for failure to assert it.

2. RES JUDICATA—*a foreclosure proceeding is not strictly a proceeding in rem.* A foreclosure proceeding is not strictly a proceeding *in rem*, since the decree is not conclusive against persons not parties to the suit.

MAGRUDER, J., dissenting.

APPEAL from the Circuit Court of McLean county; the Hon. J. H. MOFFETT, Judge, presiding.

HERRICK & HERRICK, KERRICK & BRACKEN, and BARRY & MORRISSEY, for appellants.

WELTY & STERLING, and EWING, WIGHT & EWING, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

This case was before us on a former appeal, when we decided that if the allegations of appellee's bill had been sustained by the proofs she would have been entitled to a decree for the assignment of dower, but the decree was reversed for lack of sufficient proof to sustain it, and the cause was remanded to the circuit court of McLean county for further proceedings not inconsistent with the opinion then filed. (*Lohmeyer v. Durbin*, 206 Ill. 574.) The cause having been re-instated in the circuit court, the answer was amended and the cause was again referred to the master in chancery.

Additional evidence was introduced and the master reported the same, with his conclusion that the appellee was entitled to a decree in accordance with the prayer of her bill. The court overruled exceptions to the report and entered a decree finding appellee entitled to dower and appointing commissioners to set it off to her.

The reason for the reversal of the first decree was, that proof of the fact that William L. Drybread conveyed the lands in which complainant claimed dower, to her husband, Daniel M. Durbin, was not inconsistent with the allegations of the Blackford bill, and the findings of the decree thereon, that Blackford sold said lands to Durbin and caused the same to be conveyed to him. All that was proved might have been true, and it might also have been true that the premises were sold by Blackford to Durbin and that Blackford caused Drybread to make the conveyance. On the second reference to the master the necessary proof was supplied. Certified copies of two patents, dated July 1, 1854, from the United States to William L. Drybread, covering the property in question, were introduced in evidence. Drybread then testified that the complainant was his sister; that he entered the land from the government; that she paid him for the land; that he knew John R. Blackford; that Blackford had no interest in the land and had nothing to do with its conveyance to Durbin, and that he did not convey it for Blackford or at his request. He also testified that he first executed a deed to the complainant; that she and her husband afterward came to him and wanted him to make a deed to the husband, and that he destroyed the first deed and made one to the husband, Daniel M. Durbin. The Blackford bill alleged that the land upon which a lien was claimed was conveyed to Durbin by one Thomas Gardner, Jr., who then held the legal title to the land although Blackford held the equitable title. A deed from Thomas Gardner, Jr., and wife to Daniel M. Durbin of one hundred and twenty acres of land adjoining this land and included in the Blackford bill

was also offered in evidence. The proof established the facts that Blackford did not sell the land involved in this suit to Daniel M. Durbin; that he did not cause Drybread to convey it; that he had no agreement with Durbin to execute a purchase money mortgage on the same, as alleged in his bill; that the deed of Gardner mentioned in said bill did not include this land which Blackford never owned and never sold to Durbin, and that the allegations of the bill, so far as it related to this land, were untrue. The proof was satisfactory that the land in which dower is claimed was included in the bill and decree in the Blackford case through some mistake, and the findings of the master and court on that question were correct.

The questions of law in the case were considered and decided on the former appeal but are now re-argued by counsel for appellants. They insist that the appellee was barred of her claim for dower by *laches* and estoppel, and that she was conclusively bound by the decree in the Blackford case. While her husband, Daniel M. Durbin, was living she could not assert her right to dower against him or any other person. She had no vested estate, but a mere inchoate right or expectancy which she could not have asserted, and if she had died before her husband the right would have been extinguished. (*Kauffman v. Peacock*, 115 Ill. 212; *Miller v. Pence*, 132 id. 149; *Goodkind v. Bartlett*, 136 id. 18; *Kusch v. Kusch*, 143 id. 353; *Virgin v. Virgin*, 189 id. 144.) Counsel say that there is no difference, in principle, between the protection of an estate by the curtesy and a right of dower, and that the husband was allowed to protect his estate in the lifetime of his wife in the case of *Freeman v. Hartman*, 45 Ill. 57. In that case a voluntary conveyance was set aside because it was in fraud of the marital rights of the husband. The interest of a husband in the estate of his wife is within the protection of the statute, which declares void all conveyances made to defraud. (14 Am. & Eng. Ency. of Law,—2d ed.—252.) The deed was voidable at his election, and he

was therefore enabled to set it aside. The right of a wife to set aside a deed under like circumstances because in fraud of marital rights is not doubted, but it does not follow that she can assert a dower right in the lifetime of her husband. In the case of *Gilbert v. Reynolds*, 51 Ill. 513, the claim of dower was based on the alleged invalidity of a decree of divorce granted thirty-five years before, and the husband had married again the same year of the divorce, and it was held that the silence and inaction of the complainant for fifteen years after she knew of the decree was a fraud. She could have proceeded to have had that decree set aside at any time after she knew of it. Other cases are cited by counsel where it was held that dower was barred by an election of the widow knowingly and understandingly made, by which she received a bequest or other benefit in lieu of dower, and they do not sustain the claim made. The complainant was not barred by *laches*.

The ground upon which it is insisted the complainant was conclusively bound by the decree in the Blackford case is, that it was a judgment *in rem* and binding upon all persons. A judgment or decree is strictly *in rem* when it is not rendered against a specific person but against all whom it may concern and binds third persons. But a bill to foreclose a mortgage or lien is not solely a proceeding *in rem*. The object is to reach and dispose of property, but the proceeding is for the enforcement of an obligation *ex contractu* against a specific person and to foreclose his equity of redemption. The complainant could not be affected by the decree in a foreclosure suit to which she was not a party.

By the amendment to their answer the defendants alleged that on May 6, 1861, complainant and her husband filed a bill in the circuit court of McLean county to enjoin the sale under the Blackford decree, alleging that complainant purchased the land now in question from Drybread with her own money; that he made and delivered to her a warranty deed, which was never recorded; that she afterwards mar-

ried Durbin, who was dissatisfied with the fact that the title was in her and persuaded her to deliver back the deed and have a new deed made to him, which was done; that the description of the land was left blank in drafting the Blackford bill, but the blank was afterward filled up so as to include her land with other property; that she and her husband never thought that the bill sought to subject any land except that purchased from Blackford to the payment of the purchase money therefor and did not know that the bill included this land; that by virtue of the decree rendered by default the master had advertised for sale this land which Blackford never owned or sold or was otherwise interested in. The proof was that such a bill was filed praying that the title to the land be decreed to be in complainant; that a writ of injunction was issued restraining the sale, but the injunction was dissolved; that a general demurrer to the bill was sustained and the complainant took leave to amend the bill, and that on July 6, 1865, the suit was stricken from the docket with leave to re-instate at pleasure. In this case the complainant is only claiming dower, and does not assert any title on the ground that the land was first deeded to her and afterward conveyed to her husband by Drybread without any re-conveyance from her. The defendants are not in a position to make any such claim for her, and she is not barred of her claim for dower by having filed a bill asserting title as equitable owner. The attempt was futile and a general demurrer to her bill was sustained. The defense of Blackford and the other defendants to that bill was successful, and it was held that she had not stated any case entitling her to relief. We do not see how she could be affected in this suit by having filed the other bill.

The decree is affirmed.

Decree affirmed.

Mr. JUSTICE MAGRUDER, dissenting.

THE PEOPLE *ex rel.* Oliver L. Parker, County Treasurer,
v.

THE CINCINNATI, INDIANAPOLIS AND WESTERN RY. CO.

Opinion filed December 22, 1904.

1. TAXES—*what a sufficient determination of aggregate amount of county tax.* A resolution of the county board fixing the rate to be levied upon the \$100 valuation for a tax for county purposes is an indirect determination of the aggregate amount required, and is not so uncertain in that respect as to invalidate the tax.

2. SAME—*the county board's resolution should state the separate amount for each purpose.* Under section 121 of the Revenue act, if the county tax is required for several purposes the county board's resolution should state the amount required for each purpose separately.

3. SAME—*additional road and bridge tax must be for a contingency.* The additional road and bridge tax of forty cents on the \$100, authorized by section 14 of the Road and Bridge act, cannot be levied unless the highway commissioners have certified that there is a contingency justifying the additional levy, since the latter can not be used to pay the ordinary expenses provided for in section 13, incurred in the usual way.

APPEAL from the County Court of Douglas county; the Hon. W. W. REEVES, Judge, presiding.

H. J. HAMLIN, Attorney General, and JOHN H. CHADWICK, State's Attorney, (EDWARD C. CRAIG, and ROY F. HALL, of counsel,) for appellant.

GEORGE W. FISHER, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

Appellant made application to the county court of Douglas county for a judgment and order of sale for delinquent taxes for the year 1903, to which appellee filed objections, first, that the county board had not determined the amount of taxes to be raised for county purposes and the amount of the county tax required for each of the several purposes,

or stated the amount required for each purpose separately, and also to the road and bridge tax for the town of Murdock, in said county, that the commissioners of highways did not levy or obtain the consent of the board of town auditors to levy any sum in addition to the rate of sixty cents for the contingency provided by section 14 of chapter 121 of our statutes, and no such contingency then existed; second, that the board of auditors had no authority to consent to the levy, or the commissioners to levy, an additional forty cents to pay orders heretofore issued or for road and bridge purposes. The court below sustained these objections and denied judgment for appellee's delinquent county tax and forty cents on the \$100 of the taxable property of the town of the road and bridge tax of said Murdock township.

The order of the county board under which the county tax was levied is as follows: "Your committee to whom was referred the tax levy for the ensuing year would beg leave to submit the following report: That we have examined the financial condition of the county, and recommend that seventy-five cents on the \$100 be extended by the county clerk for county purposes. The said resolution was unanimously adopted by the board."

Section 121 of the Revenue law (Hurd's Stat. 1903, p. 1529,) is as follows: "The county board of the respective counties shall, annually, at the September session, determine the amounts of all taxes to be raised for county purposes, the aggregate amount of which shall not exceed the rate of seventy-five cents on the \$100 valuation of property, except for payment of indebtedness existing at the adoption of the present State constitution. * * * When for several purposes the amount for each purpose shall be stated separately."

The first objection to the county tax is, that the resolution of the board did not determine the amount of all taxes to be raised for county purposes, and the argument is, that fixing the rate per cent on the \$100 of all the taxable prop-

erty in the county does not amount to a determination of the aggregate amount required,—that is, that the county board should fix the aggregate amount as required, and the clerk is then to determine the rate per cent, not exceeding seventy-five cents on the \$100 valuation of property. This is doubtless the plain reading of the statute; but the effect of the resolution is to indirectly fix the amount, and on the principle that that is certain which may be made so, we are of the opinion that the objection, standing alone, was not good. On principle, *Chicago and Alton Railroad Co. v. People*, 155 Ill. 276, and *Same v. Same*, 205 id. 625, are in point.

The further objection, however, to this tax is, that the resolution of the county board did not comply with that requirement of section 121, *supra*, which makes it the duty of the board, when the tax is for several purposes, to state separately the amounts for each purpose. We have just had occasion to consider this objection in *Chicago, Burlington and Quincy Railroad Co. v. People*, (*ante*, p. 458,) and reached the conclusion that the objection is fatal to the county tax. For the reason there stated we think the county court properly sustained appellee's second objection to the county tax herein given.

The road and bridge tax objected to was levied under the following certificate: "We, the commissioners of highways of Murdock township, hereby certify that we require for road and bridge purposes, and for the payment of outstanding orders drawn on the township treasury for the year for which the tax should be levied, September 1, 1903, the rate of sixty cents on each \$100, and we also require the rate of forty cents on each \$100 valuation for road and bridge purposes, and paying outstanding orders heretofore drawn on the treasurer of said board of highway commissioners." In pursuance of this certificate a tax of one hundred cents on the \$100 was levied for road and bridge purposes, and the appellee objected to the whole of the tax,

but the court overruled the objection to sixty cents on the \$100 and sustained it as to the forty cents. In the argument considerable space is devoted to a discussion of the question whether, upon the facts, the township was under the labor or money system, but in our view of the case that question is unimportant.

It will be seen that the second objection to this tax which was sustained by the court is, that the board of auditors had no authority to consent to the levy, or the commissioners to levy, an additional forty cents to pay orders heretofore issued, or for road and bridge purposes. Section 13 of the Road and Bridge act gives the commissioners the power to levy a tax "for road and bridge purposes and for the payment of any outstanding orders drawn by them on their treasurer, which levy shall not exceed sixty cents on each \$100." The following section provides that "if, in the opinion of the commissioners, a greater levy is needed in view of some contingency, they may certify the same to the board of town auditors and the assessor, a majority of whom shall be a quorum, and with the consent of a majority of this entire board given in writing, an additional levy may be made of any sum not exceeding forty cents on the \$100 of the taxable property of the town." This forty cents on the \$100 must be to meet some contingency, and not to pay the ordinary expenses provided for in section 13, incurred in the usual manner.

It is argued by counsel for appellant that the commissioners are the judges as to the necessity or contingency which will justify the levying of the additional forty cents, provided the town auditors and assessor consent thereto in writing. If the certificate of the commissioners had been that the necessities or contingencies existing in the township required an additional levy, the position would perhaps be tenable. But that is not what the commissioners have here certified to. They attempt by their certificate to levy one hundred per cent "for road and bridge purposes and for

the payment of outstanding orders drawn on the township treasury," the additional forty cents on each \$100 being for the same purposes as the sixty cents, and without certifying or stating that any contingency has arisen or that any necessity exists for the latter levy. Section 13 is a limitation upon the power of commissioners to levy a road and bridge tax in excess of sixty cents on each \$100 for road and bridge purposes and for the payment of outstanding orders drawn by them on their treasurer, and if the position of the appellant is sustained then that limitation is entirely abrogated, whether any contingency exists or not, provided the commissioners can obtain the consent of the auditors and assessor to increase it. We think the tax-payers of the township, when called upon to pay the additional forty cents on each \$100, have a right to insist that the commissioners shall certify that there is a contingency justifying the levy.

Our conclusion is that the county court properly sustained the objections to the road and bridge tax of Murdock township to the extent of the forty cents on the \$100.

We find no reversible error in this record, and the judgment below will accordingly be affirmed.

Judgment affirmed.

CAROLINE K. RICKMAN

v.

FRANCES BRICK MEIER *et al.*

Opinion filed December 22, 1904—Rehearing denied Feb. 15, 1905.

1. FRAUD—when deed obtained by undue influence may be set aside. A deed obtained by undue influence may be set aside after the grantor's death by those succeeding to his rights, unless the grantor has ratified the deed at a time when the undue influence had ceased to operate.

2. SAME—when conveyance from a parent to child is presumed unfair. Where a fiduciary relation exists between parent and child in which the child is the dominating party, if the latter causes to be

prepared and executed a deed conveying to him property of the parent as a gift or for a grossly inadequate consideration, the presumption arises that the deed was obtained through undue influence of the child, and the burden is upon him to show the contrary.

3. *SAME*—when a transfer of personal property will be deemed free from undue influence. A transfer of personal property from parent to child, even though the latter is the dominant party to the fiduciary relation between them, will be deemed to be free from undue influence where the evidence shows the parent was the active party in making the transfer, under circumstances tending to show uncontrolled volition.

4. *WILLS*—the word “bequeath” may denote a gift of real estate. Although the word “devise” is commonly used to denote a gift of real estate, yet such estate may pass under a residuary clause of a will providing that “all the rest, residue and remainder of my estate, including household furniture, clothing, etc., I give and bequeath to the four children of my deceased son.”

5. *SAME*—when particular real estate passes under the residuary clause. Where a will provides for a particular disposition of the proceeds of certain real estate to be sold after the death of the testatrix, if the property is sold by her before her death and a codicil executed reciting that fact and the advancement of certain of the specified legacies out of the proceeds, “leaving the rest of my said will as drawn,” other real estate afterwards purchased is not subject to the particular provision but passes under the general residuary clause, particularly if there be no proof that it was purchased with the proceeds of the other property.

6. *ESTOPPEL*—when a party is estopped to urge lack of proof to support finding. If the defendant in a chancery case files an answer claiming property to be his own, which answer is adopted by his wife as her own after the husband's death, the wife is estopped to urge a want of proof to support a finding that she acquired title to the property *pendente lite*, even though the deed from her husband to her is dated prior to the institution of the suit.

APPEAL from the Superior Court of Cook county; the Hon. MARCUS KAVANAGH, Judge, presiding.

On February 24, 1890, Christiana O'Connor was the owner of three houses on Clark street and three houses on Rush street, together with the real estate on which said houses were erected, in the city of Chicago. On that date, she executed a deed, her husband joining therein with her, conveying all of said property to John F. Brick, her son, in

trust for the purposes of having him collect the rents, make necessary improvements, pay taxes and insurance and turn over to her the net rents during her life. The deed further recited that upon the written request of the grantor for that purpose, the grantee should convey said premises or any part thereof to such person and for such sum as she might designate in said request, and should also immediately turn over to her the net proceeds of said sale; and if said premises, or any part thereof, should remain undisposed of at the time of her death that he should make such disposition of the property as she should by her will direct.

On March 29, 1890, she executed a will, which recited that she thereby intended to dispose of all her property. The first clause directed the sale of the Rush street property. The next five clauses disposed of the proceeds of such sale as follows: The second clause of the will provided for the payment of her debts and funeral expenses; the third gave to Elizabeth Brick, widow of her deceased son Frank, \$1000; the fourth to Barbara Brick, the widow of her deceased son Christian, \$1000; the fifth to Mary Charbonnier, the daughter of her first husband, \$1000; the sixth disposed of the balance of the proceeds arising from the sale of the Rush street property, after the payment of the above debts and bequests, as follows: to John F. Brick one-third thereof; to Joseph Brick, her grandson, one-third thereof; and to the four children of her deceased son Frank, one-third thereof. The seventh, eighth and ninth clauses each disposed of one of the Clark street houses to John F. Brick, Joseph Brick and the four children of Frank Brick, her deceased son, respectively; and John F. Brick was directed to convey the same to the respective devisees. The tenth clause disposed of two pictures, and the eleventh clause gives and bequeaths the residue of the estate to the four children of her deceased son, Frank Brick. By the twelfth clause, John F. Brick and Frank Spohrer were nominated executors of the will without bond,

On April 6, 1891, Christiana O'Connor directed the sale of the Rush street property by her trustee for \$26,643, and John F. Brick, in compliance with that direction, conveyed the same to the purchaser, and the proceeds were turned over to Mrs. O'Connor. On June 8 of the same year, she made a codicil to her will, which, after reciting that she had sold the Rush street property and had given to Elizabeth Brick, Barbara Brick and Mary Charbonnier each \$1000, proceeded as follows: "I therefore do hereby revoke the bequests made in and by paragraphs numbered third, fourth and fifth in my last will and testament * * * to the above named parties, leaving the rest of my said last will as drawn."

On August 24, 1899, she purchased certain real estate on Barry avenue, in the city of Chicago, which is the real estate involved in this suit, and is referred to in this litigation as the Barry avenue property, paying therefor \$14,000, and afterwards, on July 27, 1902, together with her husband, delivered a deed for the same to John F. Brick for an expressed consideration of one dollar. At the time she executed this deed she was confined to her bed, suffering from tuberculosis. She was in constant pain and never thereafter left her bed. Her death occurred on September 12, 1902. She was then seventy-two years of age. John F. Brick was her only living child. He was a cripple and in poor health. He resided in one of the Clark street houses, next to that occupied by his mother, and during her illness he and his wife, now Caroline K. Rickman, spent a large portion of their time at her home. On the day the deed to the Barry avenue property was signed, John F. Brick called in the notary who prepared the deed and who took the grantor's acknowledgment thereto, and instructed him how to draw the deed and paid him for his services. He was also present at the execution of the instrument; and took an active part in securing her signature thereto. Mrs. O'Connor then lived separate and apart from O'Connor, her second husband, and he came to her home to join in this deed at the request of the grantee.

On July 31, 1902, Christiana O'Connor had money on deposit with the Hibernian Banking Association and with the Illinois Trust and Savings Bank, aggregating \$2196.30, and on that date she transferred the same to her son, John F. Brick, by delivering to him checks and receipts to the banks therefor, and he withdrew the money from the latter bank and deposited all of it with the Hibernian Banking Association to his own credit.

Christiana O'Connor left her surviving, as her only heirs-at-law, Frances B. Meier, Clara B. Aubert, Arthur Brick and Viola Brick, the children of Frank Brick, a deceased son, who were complainants below and are appellees here, and John F. Brick, her only surviving son, Joseph Brick, the only child of Christian Brick, a deceased son, and her husband, Patrick J. O'Connor, who were defendants below. On November 8, 1902, the will and codicil, above mentioned, were admitted to probate by the county court of Cook county, and John F. Brick was appointed executor thereof. On January 13, 1903, the bill herein was filed by the four children of Frank Brick, deceased, above named, in the superior court of Cook county, against John F. Brick, individually and as trustee of Christiana O'Connor and as executor of the last will and testament of Christiana O'Connor, deceased, Caroline Brick, wife of John F. Brick, Joseph Brick, Hibernian Banking Association, and Fidelity Safe Deposit Company. The bill, after setting out the above facts, charged that John F. Brick was the trustee, agent and confidential adviser of Christiana O'Connor in all her business matters, and that a confidential relation existed between them; that John F. Brick abused the confidence reposed in him, and by fraud and undue influence obtained the conveyance of the Barry avenue property from her and the transfer of the money on deposit with the two banks above named to him, and the bill prayed that the deed to John F. Brick for the Barry avenue property be declared null and void and that the title to that property be adjudged in the complainants as residuary lega-

tees of the deceased under the eleventh clause of her will; also that the money on deposit with the Hibernian Banking Association be adjudged to be funds belonging to the estate of said deceased, and that it be perpetually enjoined from paying the same or any part thereof out upon the order of John F. Brick. The defendants filed separate answers. John F. Brick admitted all the allegations of the bill except those charging fraud and undue influence, which he denied. Joseph Brick admitted all allegations except those claiming that the property passed to the complainants under the eleventh clause of the will, and he set up that the property was held in trust by John F. Brick to be distributed according to the provisions of the sixth clause of the will.

After the bill was filed, and on June 23, 1903, John F. Brick died. A supplemental bill was filed suggesting his death and alleging that Arthur Brick had been appointed administrator *de bonis non* with the will annexed of the estate of Christiana O'Connor, and that Caroline K. Brick claims to be the purchaser of all right, title and interest of John F. Brick in all his real and personal property, and alleging that such purchase was made with actual notice of the rights and claims of complainants and during the pendency of this litigation. Caroline K. Brick answered the supplemental bill, admitting that she purchased all the property from her husband, but denying that it was with actual notice of the rights and claims of complainants or during the pendency of the suit. The evidence showed that \$2000 of the money in the Hibernian Banking Association was transferred from the account of John F. Brick to that of his wife on November 20, 1902, and that the Barry avenue property was conveyed to her by deed dated November 19, 1902, acknowledged on the same date and recorded July 1, 1903.

On the same day the bill above mentioned was filed, Joseph Brick filed a bill in the same court, setting out the facts substantially as contained in the bill to which he was made a defendant, except that he averred that the Barry ave-

nue property was purchased with funds derived from the sale of the Rush street property, and was conveyed to John F. Brick to hold in trust for disposition under the sixth clause of the will of Christiana O'Connor. Issues were made up on this bill, and thereafter the cause in which Joseph Brick was complainant was consolidated with the one first hereinabove mentioned.

The consolidated causes were referred to the master to take the evidence and report his conclusions to the court. After the evidence had been heard by the master but before his report had been filed in court, the complainants in the cause first hereinabove mentioned amended their bill and charged that there was no valid delivery of the deed to John F. Brick. The master found the allegations of the bill in which Frances B. Meier *et al.* were complainants to be true; also that the property and money were obtained by John F. Brick by undue influence amounting to fraud, and were transferred and conveyed to his wife *pendente lite* and with knowledge on the part of the wife of the infirmity of her grantor's title, and recommended that relief be granted as prayed for in the bill. The master found the bill filed by Joseph Brick to be without equity, and recommended that it be dismissed. A decree was accordingly entered by the court declaring the deed from Christiana O'Connor to John F. Brick null and void, the deed from John F. Brick to his wife, now Caroline K. Rickman, to have been taken by the latter with knowledge of the rights and claims of the complainants therein and during the pendency of this suit, and that the complainants in the bill first hereinabove referred to were entitled to said property under the eleventh clause of the will of Christiana O'Connor, and ordering Caroline K. Rickman to convey the same to those complainants within twenty days, and that in default thereof the master execute and deliver to them a deed for the said premises; also ordering the Hibernian Banking Association to turn over to Arthur Brick as administrator *de bonis non* with the will

annexed of the estate of Christiana O'Connor, deceased, the \$2000 on deposit with it in the name of Caroline K. Rickman, which had been transferred to her by John F. Brick from his account and which was part of the money received by him from his mother. The decree also dismissed the bill filed by Joseph Brick for want of equity.

Caroline K. Rickman appeals from that decree to this court, and here urges that the evidence for appellant is sufficient to rebut any presumption of undue influence on the part of John F. Brick in obtaining the property in question; that that property was not the subject matter of any trust, and that under the circumstances shown by the evidence in the case, fraud is not to be presumed between parent and child; also that even though undue influence was proven, the conveyance was only voidable at the election of Mrs. O'Connor, and she having failed to repudiate it during her lifetime, the same cannot now be set aside at the instance of the complainants in the bill. It is also contended that if the decree is supported by the evidence, it is nevertheless erroneous in finding that the title to the Barry avenue property is in the complainants alone; that in any event it should only have found them entitled to one-third of the property on the theory that—the deed failing—the property passes under the sixth clause of the will and not under the eleventh or residuary clause.

ERNEST SAUNDERS, for appellant.

NILES E. OLSEN, and LOESCH BROS. & HOWELL, for appellees.

Mr. JUSTICE SCOTT delivered the opinion of the court:

The gifts made by the deceased to John F. Brick are attacked principally on the ground that they were obtained through the undue influence of the donee.

Appellant argues that a deed or gift obtained through undue influence is not void, but voidable at the election of

the grantor or donor alone, and that as Christiana O'Connor did not exercise her option to declare the gifts void in her lifetime, they cannot be attacked by her representatives after her death, and reliance is placed upon the case of *Burt v. Quisenberry*, 132 Ill. 385. In that case it is held that though a deed be obtained by undue influence, the party executing it may elect to re-affirm it when the influence under which it was obtained has entirely ceased; and if he do so, then it becomes valid and binding precisely as though it had been the result of the uncontrolled volition of the grantor in the first instance; and in that case it was held that the attack made on the deeds could not avail, for the reason that the grantor had ratified them at a time when he was entirely free from the influence which it was charged had been unduly exercised to secure their execution.

The law is that where a deed or other conveyance has been procured by undue influence, if it be not ratified by the party making it after the undue influence has ceased to operate, it may be set aside after his death at the suit of those who succeed to his rights. Bigelow on the Law of Fraud, p. 268; *Walker v. Smith*, 29 Beav. 394; *LeGendre v. Goodridge*, 46 N. J. Eq. 419; *Prentice v. Achorn*, 2 Paige, 30; *Lins v. Lendhardt*, 127 Mo. 271; *Martin v. Bolton*, 75 Ind. 275.

Christiana O'Connor was confined to her room and bed from July 1, 1902, to September 12, 1902, when she died. During this time she grew weaker, both physically and mentally, except that she would rally at times for a day or two. John F. Brick was her only surviving child. He lived next door to her and was without any occupation except caring for her and assisting her in her business, and during the period last mentioned she seems to have relied almost entirely upon him, both to care for her in her illness and to attend to her affairs. She had made him trustee for her by a deed which conveyed to him in trust real estate of great value, comprising by far the greater portion of her property.

He was to be one of the executors of her will without bond. She rented a box in a safety deposit vault and had given him the key and written authority by virtue of which he had access to that box and all her valuable papers, including her will, at all times. The relations between them, business, personal and domestic, were exceedingly close and intimate. He was her confidant and adviser. Age and disease had seriously weakened her physical and mental powers, and while not mentally disqualified to transact such business as conveying property, yet the weakness of her mind was such as led her to rely upon and be guided by the judgment of her son. We are satisfied that at all times after she was confined to her room a fiduciary relation existed between them in which he was the dominant and controlling factor and she the trusting and dependent one. The scrivener prepared the deed in question at his instance and under his direction, and he procured its execution by his mother.

A gift made by the parent to the child on account of the affection of the former for the latter, even where it is made at the solicitation of the child, is not the object of suspicion, and there is no presumption against its validity unless the relation between them is something more than the ordinary relation of parent and child. *Burt v. Quisenberry*, *supra*; *Oliphant v. Liversidge*, 142 Ill. 160; *Francis v. Wilkinson*, 147 id. 370.

Where, however, the natural position of the parties has become reversed, where the parent defers to, trusts in and yields to the child, where there exists between them what in law is termed a fiduciary relation, in which the parent is dominated by the child, and where the child prepares, or causes to be prepared and executed, an instrument conveying to him property of the parent, as a gift or upon a grossly inadequate consideration, the presumption arises that the transfer was obtained through his undue influence, and the burden then rests upon him to show that the conveyance was the result of full and free deliberation on the part of the

parent. This is not peculiar to transactions where the parties are parent and child, but is the law in any case where a fiduciary relation exists, where the conveyance is from the dependent to the dominant party, and where the donee or grantee prepares or procures the preparation and execution of the deed or other instrument; and the rule is applied, under such circumstances, wherever that relation exists, no matter whether the parties are related by blood or not. 1 Woerner on American Law of Administration, (2d ed.) sec. 32; Bigelow on the Law of Fraud, p. 361; *Thomas v. Whitney*, 186 Ill. 225; *Dowie v. Driscoll*, 203 id. 480; *Weston v. Teufel*, ante, p. 291; *Richmond's Appeal*, 59 Conn. 226; *Coghill v. Kennedy*, 119 Ala. 641.

The deed conveying the Barry avenue property was written by Lewis A. Rheinhardt, a notary public and law clerk, who lived in the same building in which John F. Brick resided. On the day on which it was executed, Mr. Rheinhardt prepared a deed for signature in accordance with the directions of John F. Brick. It was taken by Rheinhardt to Mrs. O'Connor's room, where she was in bed. John F. was present. She attempted to sign, but was unable to do so and blotted the instrument so that it was deemed advisable to prepare another. When the second was prepared, the same thing occurred, and the scrivener thereupon prepared a third. In the meantime a stimulant had been administered to the sick woman, and when the third document was presented to her she was able to attach her signature. The notary did not read either of these instruments to her and says he presumed "she must have understood the purport of the execution of these deeds, as John informed me it was pre-arranged." Her failure to sign the first two instruments presented resulted partly from physical weakness and partly from a confused mind which made her uncertain about forming the characters in writing her name or about the order in which they should be written. When the first deed was presented to her, John said: "Mother, Mr. Rheinhardt has got this deed now

ready for you to sign." After she had marred and failed to sign it, the son said that she had spoiled it, and, addressing Rheinhardt in her presence, continued: "Well, you may as well get through it while you are here. You can go up-stairs and make another deed." When the notary returned, the son said to her: "Mr. Rheinhardt has that second deed made out now and you want to try and sign this one and don't spoil it." When she had failed to sign the second and had so blotted it that the preparation of the third was rendered necessary, her husband, who was present, said: "Let it go for to-day; she is in a weakened condition." John F. said to her: "Don't you think you can sign that to-day?" and the mother responded: "Well, we might just as well get through with it." The stimulant was taken by her at the instance of her son, who suggested that it would make her feel better and steady her nerves.

The testimony does not satisfy us that this woman knew what she was signing. The notary says: "I did not read the deed to her; she had confidence enough in me, because I had known her for a long time, that when the deed was made out it was all right." She did not read and there is no evidence that she was in any way made acquainted with the description of the property contained in the deed. The proof offered by appellant fails to show that the execution of the deed was the result of full and free deliberation on the part of the grantor therein.

On the occasion of the transfer of the money in bank, Rheinhardt went to Mrs. O'Connor's room in response to a message which she sent to him by the wife of John F. Brick. When he reached there, he found that she was better and was unusually bright, and made some witty remark to him in the German language. She told him that she had sent for him, as she wanted to see him before he started down town; that she had money in the Hibernian Bank and in the Illinois Trust and Savings Bank; that she wanted John to have that money because he was a cripple and could not work,

and wanted Rheinhardt to go down with John and do whatever was necessary to be done to put that money in John's name. In accordance with this request, Rheinhardt and John went to the Illinois Trust and Savings Bank and later to the Hibernian Bank. In each instance they acquainted the bank officers with the fact that Mrs. O'Connor was sick and unable to come down and that she wanted to transfer the money on deposit to John. The money in each bank was in the savings department, not subject to an ordinary check, and, for the purpose of making the transfer, in each instance a clerk filled up a check payable to John for the amount on deposit and an instrument in the nature of a receipt running to the bank, which is termed a release, both to be signed by Mrs. O'Connor. They then returned. Mrs. O'Connor signed them and said to John: "Now you can go down and get the money," and he took the checks and releases and had the money transferred to his own account.

So far as the money thus transferred to the son is concerned, we think the evidence overthrows any presumption arising from the fiduciary relation. It seems that the mother was here the active party in making the transfer and having the papers evidencing the transaction drawn instead of the son, as in the case of the deed; and while the gift of the money was no doubt induced by the affection which she had for her son, and perhaps was made in response to his request, yet we think the circumstances surrounding the transaction, as disclosed by the evidence, show that the gift resulted from her uncontrolled volition.

The court below held that the real estate, which the deed in question purported to convey, passed to the complainants in the original bill, under the residuary clause of the will, which reads as follows:

"All the rest, residue and remainder of my estate, including household furniture, clothing, etc., I give and bequeath to the four children of my deceased son, Frank Brick."

At the time the will was drawn, the testatrix did not own this Barry avenue property, and appellant's view seems to be that this property should be held to pass under those provisions of the will which direct a disposition of the proceeds of the Rush street property, which had been sold after the execution of the will, on the theory that the Barry avenue property was purchased with the proceeds of the Rush street property, and that it does not pass under the residuary clause for the further reason that the words of gift therein do not include the word "devise."

According to the will, the Rush street property was to be sold after the death of the testatrix, and the proceeds were to be used to pay her debts and funeral expenses, to pay \$1000 to each one of three legatees, and the balance of such proceeds was, by the sixth clause, to be divided, one-third to John F. Brick, one-third to Joseph Brick and one-third to the children of Frank Brick who should survive the testatrix. The three legacies of \$1000 each she advanced to the legatees in her lifetime. After conveying the Rush street property, she executed a codicil, reciting the fact that that property had been conveyed, and the advancements made and revoking the three legacies of \$1000 each, and then providing "leaving the rest of my said will as drawn." When this codicil was executed she had not yet purchased the Barry avenue property. The proceeds of the Rush street property seem then to have been personalty and there is no competent evidence tracing such proceeds into the Barry avenue property. There is competent evidence establishing the fact that she disposed of the one property and some years later acquired the other, but this is not sufficient to show that the second was purchased with money arising from the first.

Under these circumstances this property passes under the residuary clause although the word "devise" was not used.

This court has heretofore held that while the word "devise" is usually employed to denote a gift by will of real

estate or an interest therein, the word "bequest" may mean any gift by will whether it consists of personal or real property. (*Evans v. Price*, 118 Ill. 593.) Following this reasoning, it would seem that the use of the word "bequeath" instead of "devise" would not necessarily lead to the conclusion that the property which the testatrix thereby intended to dispose of was personalty; but be that as it may, the word "bequeath" in this residuary clause is coupled with the word "give," which is of the largest possible signification, and is applicable as well to real as personal estate. *Hooper v. Hooper*, 9 Cush. 129; *Pierson v. Armstrong*, 1 Iowa, 282.

The decree of the court below finds that the appellant received her deed from John F. Brick *pendente lite*. It is assigned as error that there is no evidence to warrant that finding. The deed bears date prior to the beginning of this proceeding. There is no evidence showing when it was delivered save the presumption that arises from its date, and it is urged that in the absence of other evidence showing when her deed was delivered to her, it was erroneous to find that she took title after the beginning of this suit.

The answer of John F. Brick, filed January 30, 1903, admits that he claims to be the owner of the Barry avenue property by reason of the conveyance to him, and says nothing in reference to having transferred the title to his wife. After the death of John F. Brick, the appellant adopted his answer as her answer, and having adopted that answer with that averment therein showing that he claimed to be the owner of that property after the beginning of this suit by virtue of the conveyance from his mother, we think she cannot now be heard to say that the court was not warranted in finding that she took title pending this litigation.

The decree of the superior court will be reversed and the cause will be remanded to that court with directions to enter a decree dismissing the bill filed by the residuary legatees or devisees for want of equity in so far as that bill seeks to set aside the gift of the money in bank by Christiana O'Connor

to John F. Brick, and dissolving the injunction in so far as Caroline K. Rickman, formerly Caroline Brick, is restrained from transferring, receiving or checking out the portion of such money now in bank; and authorizing said Caroline K. Rickman to draw or check said portion out of the bank of the Hibernian Banking Association wherein it is now deposited, and authorizing said association to pay the same to Caroline K. Rickman or upon her order. The decree to be so entered to be in all other respects identical with the decree from which this appeal is prosecuted.

Reversed and remanded, with directions.

THE WABASH RAILROAD COMPANY

v.

THE PEOPLE *ex rel.* Frank L. Sonnet, County Treasurer.

Opinion filed December 22, 1904—Rehearing denied Feb. 9, 1905.

This case is controlled by the decision in *Chicago, Burlington and Quincy Railroad Co. v. People*, (*ante*, p. 458.)

APPEAL from the County Court of Adams county; the Hon. CHARLES B. McCORRY, Judge, presiding.

C. N. TRAVOUS, for appellant.

JAMES N. SPRIGG, County Attorney, for appellee.

Per CURIAM: All of the questions involved in this case are fully considered in the case of *Chicago, Burlington and Quincy Railroad Co. v. People*, (*ante*, p. 458,) and in accordance with the views therein expressed the judgment of the county court is reversed and the cause remanded

Reversed and remanded.

HARRY RUBENS

v.

MARTHA S. HILL.

Opinion filed December 22, 1904—Rehearing denied Feb. 15, 1905.

1. **LEASES**—*covenant construed as independent.* A provision in a lease that the lessor will cause the premises to be put in a habitable condition for the lessee by a certain date is an independent covenant rather than a condition precedent.

2. **SAME**—*covenant going to part of consideration is generally independent.* A covenant going only to part of the consideration on both sides, the breach of which may be readily compensated for in damages, is generally considered as independent.

3. **SAME**—*in case of doubt, courts are inclined to construe provision as a covenant.* In case of doubt whether the lessor intended a provision of a lease to be a covenant or a condition, courts are inclined to construe the provision as a covenant.

4. **SAME**—*when recovery may be had under common counts.* If possession is delivered to the lessee and he occupies the premises during the entire period, nothing remaining to be done except to pay the amount due for rent, a recovery may be had under the common counts.

5. **SAME**—*express covenant excludes inconsistent implied covenant on same subject.* An express covenant to put the premises in habitable condition for occupancy, followed by a statement of the particular things which the lessor is to do in that respect, excludes the idea of an implied covenant that the premises shall be fit for habitation.

6. **SAME**—*when liability for rent is not excused.* Omission by the lessor to perform some thing required by the lease which tends merely to lessen the beneficial enjoyment of the premises, does not release the lessee from liability for rent if he continues to occupy the premises for the term, although he may, in a suit for the rent, recoup such damages as are shown he sustained from such omission.

7. **SAME**—*whether the acts of the lessor amount to an eviction is a question of fact.* Whether the particular acts of the landlord amount to an eviction is a question of fact for the jury, under the evidence and proper instructions as to the law.

8. **PLEADING**—*when omission of averment from declaration is cured.* Failure of a declaration in a suit for rent to aver the use and occupancy of the premises by the defendant is cured by a plea that plaintiff entered upon defendant's possession and evicted him.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from Circuit Court of Lake county; the Hon. C. H. DONNELLY, Judge, presiding.

This is an action in assumpsit, brought by appellee, Martha S. Hill, in the circuit court of Lake county against the appellant, Harry Rubens, on September 30, 1902, to recover four months' rent at the rate of \$833.33⅓ a month for the premises, known as Ravinoaks, at Highland Park in the said county, a country seat consisting of a mansion and about eighteen acres of land, and also the furniture, carpets, hangings, and other articles of personal property on the premises at the time of the demise, and which said premises and personal property were leased to appellant by appellee for the six months during the summer of 1902 from April 15 to October 15. A schedule of the personal property was attached to the lease. By the terms of the lease appellant covenanted that "in consideration of said demise" he would pay to the appellee \$5000.00 rent for the said period of six months in six monthly installments, the first payment to be made, not at the date of the execution of the lease which was February 1, 1902, but on April 15, the date when the lessee was to take possession.

On or about the first day of the term, to-wit, April 15, 1902, appellant paid the first month's rent for the period from April 15 to May 15, 1902; and his family then took possession of the property, and continued to reside there until the end of the term, October 15, 1902. His family consisted of himself, his wife, his son, two married daughters and their husbands, two grandchildren, two nurses and four other woman servants, all of whom lived in the dwelling house. Another grandchild was born to one of his daughters in the dwelling house about September 1, 1902. On May 19, 1902, the appellant paid the second month's rent, which had fallen due about May 15, 1902, to-wit, the sum of \$833.33⅓; but appellant paid no more rent after May 19, 1902.

The declaration consisted of the common counts, except that there was inserted in it in the ordinary form of the consolidated common counts after the count for money due on an account stated and before the conclusion, the following: "And in the like sum, (\$5000.00), for money due from the defendant to the plaintiff for rent of certain premises and property of the plaintiff there situate, before that time demised and rented by the plaintiff to the defendant at his request." The declaration then concludes as follows: "And being so indebted, the defendant, in consideration thereof, then and there promised to pay the plaintiff on request the several sums of money so due to him as aforesaid. Yet defendant, though requested, has not paid the same, or either of them or any part thereof, to the plaintiff, but refuses so to do; to the damage of the plaintiff of \$5000.00," etc. Attached to the declaration as an exhibit was a copy of the lease between the parties.

The pleas were: (1) The general issue. (2) A special plea to the count for rent that, "after the making of the said supposed demise aforesaid, the plaintiff with force and arms, etc., wrongfully and unlawfully withheld from possession of this defendant a portion of the said premises, and refused to let this defendant into possession thereof, although often requested so to do, etc., and continuously thereafter until, to-wit, the time aforesaid, refused to let this defendant into possession thereof," concluding with the verification. (3) A special plea to the count for rent that "the said plaintiff with force and arms, etc., entered into and upon said premises in said count of said declaration alleged to have been demised to this defendant, and into and upon the possession of this defendant, and ejected, expelled, put out, evicted and amoved this defendant, and kept him so ejected, expelled, put out, evicted and amoved from the possession thereof, from thence hitherto," etc., concluding with the verification. (4) Special plea that the "said plaintiff with force and arms, etc., wrongfully and unlawfully entered into and upon the said

premises in said declaration alleged to have been demised to this defendant, and into and upon the possession of this defendant, and ejected, expelled, put out, evicted and amoved this defendant from the possession of a large part of said premises, to-wit, a certain tower and certain engine house or building, and portions of a certain barn or stable, being part and parcel of said premises so alleged to have been demised to this defendant as aforesaid, and kept this defendant so ejected, expelled, put out, evicted and amoved from the possession thereof from thence hitherto," concluding with the verification. Replication was filed by the plaintiff to these pleas on November 11, 1903, to which replication a demurrer was subsequently confessed by plaintiff, and an amendment made thereto in pursuance of leave to amend the same, given by the court. Upon the issues thus joined, the parties went to trial.

The jury returned a verdict for the plaintiff for the full amount sued for, together with interest to the time of the trial, that is to say, for the amount of rent due by the terms of the lease for the last four months of the rental period, beginning with June 15, 1902, and ending with October 15, 1902. Motions for new trial and in arrest of judgment were overruled, and judgment was entered upon the verdict, less the amount of \$2.02 remitted from the verdict by the appellee; and the amount of the judgment rendered was \$3547.42. The judgment for this amount has been affirmed on appeal by the Appellate Court for the Second District, and the appellant now prosecutes this further appeal to reverse said judgment of affirmance.

The tract of eighteen acres above referred to was divided by a ravine, running westerly from the lake shore, into two irregular halves or portions, called in the testimony the north half and the south half of the place. On the north half was a dwelling house and a stable. On the south half, which was improved as a kind of park, was a brick and stone tower with a wind-mill on the top of it; and there were steps lead-

ing down the bluff, which at that point was about sixty feet high, from near this tower to the beach of the lake, and at the beach there was a machine house. In the stable there were sleeping rooms on the second floor for certain of the employees upon the place.

The lease recites "that the party of the first part (appellee) for and in consideration of the covenants and agreements hereinafter mentioned to be kept and performed by the party of the second part (appellant), has demised and leased to the party of the second part the premises," (as above described), "together with all the buildings and improvements thereon, to be occupied as a dwelling house and country seat," together with the personal property above mentioned; "to have and to hold the same unto the party of the second part, from the 15th day of April, 1902, until the 15th day of October, 1902. And the party of the second part in consideration of said demise, does covenant and agree with the party of the first part as follows: First, to pay as rent for said demised premises the sum of \$5000.00, payable in six equal monthly installments of \$833.33 each, the first of said installments to be paid on the 15th day of April, 1902, and the other five installments each to be paid on the 15th day of each succeeding month until the said sum of \$5000.00 shall have been fully paid; second, the said party of the first part hereby agrees to cause said premises to be put into a habitable condition and make the same ready for occupancy by the said party of the second part, on or before the said 15th day of April, 1902; meaning and intending hereby that the boards covering the windows and doors of the dwelling house shall be removed by the said party of the first part, the fixtures connected with the plumbing, and the dwelling house put in condition for occupancy." By the terms of the lease the lessor agrees to employ a gardener on the premises, and such additional help as may be necessary to maintain the lawns, shrubbery, vegetables, etc.; and also to keep a horse and wagon in the barn to be used by the

gardener in the performance of his work; also to pay the water rents and the expense of sprinkling Sheridan road, in front of the premises; also to cause the garden thereon to be planted with certain vegetables for the use of the lessee, provided that the gardener employed by the lessor be allowed to have certain seeds for the planting of the crop of the next season, and enough vegetables to supply his own table; also to have the lawn fertilized at her own expense if necessary; also to sell to the lessee the chickens on the place at the beginning of the lease, the gardener to have the privilege of supplying himself with eggs, etc. The seventh clause of the lease was as follows: "It is agreed that the wind-mill on the water tower on the premises is not in order to supply water, and is not to be operated." The lease contains further provisions to the effect that the parties will meet for the purpose of checking up the articles of personal property leased to the lessee; also to the effect that, in case the dwelling house or barn should be destroyed by fire prior to April 15, 1902, and should not be re-built before April 15, 1902, then the lease should, at the option of the lessee, be null and void. The eleventh clause of the lease, so far as it is necessary to quote the same, is as follows: "The said party of the second part (the lessee) hereby agrees that he will keep said premises in good repair, and will immediately replace all broken globes, glass or fixtures with those of the same size and quality as that broken, and will keep said premises and appurtenances in a clean and healthy condition, according to the city ordinances and direction of the proper public officers, during said term, and upon the termination of this lease in any way, will yield up said premises and said personal property to said party of the first part in good condition, loss by fire and ordinary wear and tear excepted." By the terms of the lease the lessee agrees that the premises shall not be used for any other purpose than as a dwelling house for himself and family, and that he will not sub-let the same, nor assign the lease without the written consent of the landlord, etc., "and will

not permit the same to remain vacant or unoccupied for more than ten consecutive days, and will not permit any alteration of or upon any part of said demised premises, nor allow any signs or placards posted or placed thereon." The last clause of the lease is as follows: "In case said premises shall be rendered untenable by fire or other casualty, on or after April 15, 1902, and during the term of this lease then the lessee may at his option terminate this lease."

RUBENS, DUPUY & FISCHER, for appellant:

Conditions precedent contained in an instrument sued upon must be averred. Averment of a contract without averring the conditions contained therein is tantamount to averring that the contract contained no such conditions. *People v. Glann*, 70 Ill. 232; 1 Chitty's Pl. (16th Am. ed.) 305, 329, *et seq.*; *Insurance Co. v. Rogers*, 119 Ill. 474; *Insurance Co. v. Nelson*, 65 id. 415; *Mutual Aid v. Paine*, 17 Ill. App. 572; Abbott's Brief on Pleadings, (2d ed.) sec. 133.

Under the common counts no instrument is admissible except a contract for the absolute, unconditional payment of money without conditions. *Meyers v. Phillips*, 72 Ill. 460.

The common counts proceed upon a pre-existing debt or an agreement implied by law from the facts stated. 1 Chitty's Pl. (14th Am. ed.) 340, 341.

The condition contained in this lease was a condition precedent, inasmuch as it was to be performed before appellant was to pay any money. *Baird v. Evans*, 20 Ill. 30; 18 Am. & Eng. Ency. of Law, (2d ed.) 620, note 7; 1 Chitty's Pl. (16th Am. ed.) 331; *White v. Wakefield*, 39 Ill. 509; *Clark v. Ford*, 41 Ill. App. 199; *Wright v. Lattin*, 38 Ill. 293.

A lease will be construed most favorably to the lessee. *Schmohl v. Fiddick*, 34 Ill. App. 190.

No excuse for non-performance or waiver of performance is admissible in evidence under the common counts, nor in the absence of a special count setting up such alleged excuse or waiver. *Parmly v. Farrar*, 169 Ill. 606; *Peoria v.*

Construction Co. 169 id. 36; *Burnham v. Roberts*, 70 id. 19; *Insurance Co. v. Kemp*, 29 Ill. App. 232; *Brand v. Henderson*, 107 Ill. 141.

The contract must be completed to authorize a recovery under these counts. *Throop v. Sherwood*, 4 Gilm. 92; *Lane v. Adams*, 19 Ill. 167; *Sands v. Potter*, 165 id. 397; *Eggleson v. Buck*, 24 id. 262.

Where the contract has not been fully performed, but the plaintiff claims that literal performance on his part has been excused or waived so that he is entitled to recover without proof of full performance, he must declare specially and must set up such excuse or waiver of performance. *Burnham v. Roberts*, 70 Ill. 19; *Insurance Co. v. Kemp*, 29 Ill. App. 232.

Eviction from a portion of the premises suspends the rent but does not terminate the lease, and the lessee may remain in possession of the balance of the demised premises until the expiration of the term and is not bound to pay rent therefor. *Smith v. Wise*, 58 Ill. 141; *Hayner v. Smith*, 63 id. 430; *Walker v. Tucker*, 70 id. 527; 11 Am. & Eng. Ency. of Law, (2d ed.) 458; 18 id. 298; 12 Ency. of Pl. & Pr. 848; *Upton v. Townsend*, 48 Eng. C. L. 30.

Rendering demised premises uninhabitable may amount to an eviction. *Halligan v. Wade*, 21 Ill. 470; *Wright v. Latin*, 38 id. 293.

In a lease of a furnished home for a short period, such as a season or a summer, there is always an implied covenant or warranty on the part of the lessor that the premises are fit for habitation. *Ingalls v. Hobbs*, 156 Mass. 348; *Smith v. Marrabie*, 11 M. & W. 5; *Wilson v. Hatten*, L. R. 2 Exch. Div. 336.

GWYNN GARNETT, and EUGENE H. GARNETT, (CHAS. WHITNEY, of counsel,) for appellee:

In Illinois, assumpsit for rent on a lease for years is unauthorized by the strict rule of the common law, for it did not exist in England in the fourth year of James I, and the

statute of 11 George II is not in force here. There is, it seems, no authority in this State, except universal practice, for assumpsit either on a special count or on the count of use and occupation on a lease for years, but assumpsit has been generally adopted as a convenient remedy by common consent, and by reason of uniform practice its use as a remedy to recover rent on leases for years is beyond question. *Gibson v. Courthope*, 1 D. & R. 205; *Jones v. Reynolds*, 7 C. & P. 336; *Little v. Martin*, 3 Wend. 219; *Sullivan v. Jones*, 3 C. & P. 579.

If there was any defect in the declaration in not averring use and occupation, the defect was supplied by the defendant's pleas. *Wallace v. Curtis*, 36 Ill. 157; *Barrett v. Lingle*, 33 Ill. App. 91; 1 Chitty's Pl. 671.

There is no variance between the declaration and the proof, even if the lease sued on contained conditions precedent to recovery. *Pickard v. Bates*, 38 Ill. 40; *Combs v. Steele*, 80 id. 101; *Fowler v. Deakman*, 84 id. 130; *Neagle v. Herbert*, 73 Ill. App. 20; 64 id. 622; *Shepard v. Mills*, 173 Ill. 223; *Springer v. Orr*, 82 Ill. App. 558; *Railroad Co. v. Nixon*, 99 id. 503; 199 Ill. 234.

Appellee's covenant to put the house in condition for occupancy before the beginning of the term was not a condition precedent to recovery by her. *Nelson v. Oren*, 41 Ill. 23; *White v. Gillman*, 43 id. 502; *Palmer v. Meriden Britannia Co.* 188 id. 522; *Lunn v. Gage*, 37 id. 28.

On the demise of a furnished house at a watering place for a single season there is no implied covenant of tenantability. *Davis v. George*, 67 N. H. 396.

Where an instrument contains an express covenant upon a subject there is no room for an implied covenant. *Taylor on Landlord and Tenant*, (8th ed.) sec. 253; 12 Am. & Eng. Ency. of Law, (1st ed.) 1012; 8 id. (2d ed.) 83; *Finley v. Steele*, 23 Ill. 56.

On a demise of premises to be used for a specific purpose there is no implied covenant that the premises are fit for that

purpose. *Hart v. Windsor*, 12 M. & W. 83; *Sutton v. Temple*, 12 id. 52; *Howard v. Doolittle*, 3 Duer, 464; *Cleve v. Willoughby*, 7 Hill, 83; *Sunasack v. Morey*, 98 Ill. App. 506; *McCoull v. Herzberg*, 33 id. 545.

Partial performance and waiver of the balance of performance may be shown under the common counts. *Catholic Bishop v. Bowes*, 62 Ill. 188; *Holmes v. Stummell*, 24 id. 371; *Geary v. Bangs*, 138 id. 79; *Mount Hope Cemetery v. Weidenmann*, 139 id. 74; *Wolf v. Schlacks*, 67 Ill. App. 118; *Foster v. McKeown*, 192 Ill. 339; *Russell v. Insurance Co.* 132 Mass. 493; *Levy v. Insurance Co.* 10 W. Va. 565; *Insurance Co. v. Grunert*, 112 Ill. 68.

There was no eviction. *Keating v. Springer*, 146 Ill. 495; *Upton v. Townsend*, 84 Eng. C. L. 30; *Patterson v. Graham*, 40 Ill. App. 399; 11 Am. & Eng. Ency. of Law, (2d ed.) 470.

There is no evidence in the record as to rental value of the premises. Evidence on this point can alone be considered in determining damages. *Long v. Gieret*, 57 Minn. 278.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

First—The first objection, made by the appellant, is that the lease was not admissible under the declaration, and that, therefore, its admission by the trial court was error. The charge is made that there was a variance between the allegations of the declaration and the terms of the lease, introduced in evidence. It is said that the declaration counted upon an absolute, unconditional agreement to pay money, and that the lease, offered in evidence, contained conditions precedent to be performed by appellee before appellant was bound to pay any money; and that, therefore, there was a fatal variance. The provision of the lease, which counsel for appellant in their objections on the trial below pointed out as constituting a condition precedent, is the provision, which requires appellee "to cause said premises to be put into a habitable

condition and make the same ready for occupancy by the said party of the second part on or before the said 15th day of April, 1902," etc. If the agreement of the appellee to cause the premises to be put into a habitable condition, and to make the same ready for occupancy before the commencement of the term, involves or is equivalent to an agreement to repair the premises, then it constitutes an independent covenant merely. In the construction of a particular provision the intention of the grantor governs, and where there is any doubt whether the intention of the grantor is to create a covenant or to create a condition, the courts are inclined to construe it as a covenant, and not as a condition. (6 Am. & Eng. Ency. of Law,—2d ed.—p. 502; *Davis v. Wiley*, 3 Scam. 234; *Lunn v. Gage*, 37 Ill. 19). The provision in question, being a covenant, cannot be regarded otherwise than as an independent covenant. It is only where covenants are dependent, that the performance by each party of his own covenant is a condition precedent to his right to recover on the covenant of the other party. (18 Am. & Eng. Ency. of Law,—2d ed.—p. 620). If the provision in question be regarded as a covenant to repair, then it is independent of the covenant to pay rent. The general rule is, that the covenant of the landlord to repair or make improvements, and the covenant of the lessee to pay the rent, are independent. (18 Am. & Eng. Ency. of Law,—2d ed.—p. 620; *Haven v. Wakefield*, 39 Ill. 509). It is to be observed that, in the case at bar, appellant as lessee covenants to pay rent in consideration of the demise alone, and not in consideration of both the demise and of the agreement to put the premises into a habitable condition and make the same ready for occupancy before the beginning of the term. This is another circumstance, going to show that the covenant as to habitability and occupancy is independent of the covenant to pay rent. In *Baird v. Evans*, 20 Ill. 29, where the lessor agreed to make certain improvements upon the leased premises, and the agreement was held to be a condition precedent to the payment of the rent, the

consideration for the payment of the rent was not merely the leasing of the premises, but the making of the improvements. Such is not the case here, and, hence, the covenant here under consideration, being an independent covenant, is not a condition precedent. If such a covenant is violated, the lessee has an action against the lessor for damages, or can recoup for damages. (*Nelson v. Oren*, 41 Ill. 18; *White v. Gillman*, 43 id. 502; *Lunn v. Gage*, 37 id. 19; *Wright v. Lat-tin*, 38 id. 293; *Haven v. Wakefield*, 39 id. 509; *Palmer v. Meriden Britannia Co.* 188 id. 508).

But let it be admitted that appellant agreed to pay rent, not only in consideration of the leasing of the premises to him, but also in consideration of the agreement that appellee would put them into a habitable condition and make them ready for occupancy before the beginning of the term on April 15, 1902; then, in such case, the consideration has two parts, one of which is the leasing of the premises, and the other is the making of the same habitable and fit for occupancy. It is well settled that, where a covenant goes only to a part of the consideration on both sides, and the breach of such covenant may be readily compensated for in damages, it is generally considered independent. (18 Am. & Eng. Ency. of Law,—2d ed.—p. 619).

In *Nelson v. Oren*, *supra*, where, in consideration of a certain sum of money, Nelson assigned a lease to Oren, and in the same instrument agreed to deliver up possession of the premises on a certain day, and the lease was assigned, but Oren failed to get possession on the day agreed upon, it was held that an important part of the consideration was executed by the transfer of the term, although the remaining part was not executed, and that, for the breach of the latter, appellee had a right to recover damages; and in that case we said (p. 23): "We do not consider that delivery of possession, under a fair construction of this covenant, was a condition precedent to the right of appellant to recover for the unexpired term. That would seem to be the most import-

ant part of the contract, and where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration. * * * The covenant to put the appellee in possession was an independent covenant, the breach of which could be compensated in damages." So, here, the covenant as to habitability and occupancy was an independent covenant, the breach of which could be compensated in damages, and it was not necessary to aver the performance thereof in the declaration.

In *Wright v. Lattin*, *supra*, we said (p. 296): "If he (the landlord) covenant to repair before the term commences, it may be the tenant might refuse to enter upon the term until the repairs were made, but having entered upon the term and received possession, he cannot abandon the lease and refuse to pay rent for the breach of any other covenant, except for quiet enjoyment. If the landlord fail to repair according to his covenant, the tenant may recoup the amount from the rent, or may sue upon the covenant." In the case at bar, the appellee covenanted to do certain things before the term of the lease began, and, while the appellant might have refused to enter upon the term until those things were done, yet inasmuch as he did enter upon the term and took possession and kept possession until the termination of the lease on October 15, 1902, he cannot refuse to pay rent for the failure of the landlord to do the things, which he agreed to do before the commencement of the term. Appellant, while refusing to pay rent, did not abandon the lease.

In *White v. Gillman*, 43 Ill. 502, where appellee sold to appellant, his landlord, all the crops on his land at a certain price, and agreed to leave the premises in ten days with all his traps, and did leave the premises within the time named, but left a part of such traps, it was claimed by the appellant that removal of all the traps within the time specified was a

condition precedent, and such condition not being performed by appellee, the latter had no right of action to recover the price agreed to be paid, but the construction thus contended for was not allowed.

In *Palmer v. Meriden Britannia Co.* 188 Ill. 508, this court said (p. 522): "Where the plaintiff's covenant goes to only a part of the consideration, and a breach of the covenant can be compensated in damages, the defendant cannot rely upon the covenant as a condition precedent, but must perform the covenant on his part, and then rely upon his claim for damages for any breach of the covenant by the other party, either by way of recoupment, or in a separate action." We are, therefore, of the opinion that the covenant here insisted upon by the appellant as being a condition precedent cannot be regarded as a condition precedent, and, therefore, the lease was not inadmissible under the common counts for the reason insisted upon.

Here, there was a performance of the contract. Possession of the premises was delivered to appellant, and he occupied the premises for the full period of six months specified in the lease, and at the expiration of the lease nothing remained for him to do on his part except to pay the amount due for the rent. The contract was fully performed on the part of the plaintiff, and, where such is the case, recovery can be had under the common counts. In *Mount Hope Cemetery Ass. v. Weidenmann*, 139 Ill. 67, this court said (p. 74): "*Indebitatus assumpsit* lies upon a written contract, though it be under seal, when the plaintiff has performed and nothing remains to be done under it but the payment of money, which payment it is the duty of the defendant, under the contract, to make. In such case the plaintiff need not declare specially." It is well settled that, while there is no liability by implication of law upon an express contract executory in its provisions, yet where there has been full performance and nothing remains to be done but the payment of money, or where there has been only part performance

and the remainder has been waived or prevented, and the work performed has been accepted, a recovery may be had under the common counts. (*Catholic Bishop of Chicago v. Bauer*, 62 Ill. 188; *Fowler v. Deakman*, 84 id. 130; *Evans v. Howell*, 211 id. 85; *Foster v. McKeown*, 192 id. 339; 2 Greenleaf on Evidence, sec. 114).

It is claimed by counsel for appellant, that the declaration is defective in not averring that appellant used or occupied the premises in question. If such a defect exists in the declaration, we think that it was cured by the pleas. The pleas, as set forth in the statement preceding this opinion, averred that, after the making of the lease, the appellee entered upon the possession of the appellant and evicted him. In *Wallace v. Curtiss*, 36 Ill. 156, where there was a material omission in the declaration, it was held that such omission was supplied by the special plea, it being there said (p. 158): "The pleas cured the omission.- * * * The issues were not alone on the facts stated in the declaration, but upon the agreement stated in the special pleas, and they may be taken as amendatory of the declaration, of the issue and verdict, in order to favor the justice of the case." Chitty in his work on Pleadings, (marg. p. 671), cites a case, which illustrates this principle, and says that, in an action for trespass for taking a hook, where the plaintiff omitted to state that it was his hook and that it was in his possession, and the defendant in his plea justified the taking the hook out of the plaintiff's hand, the court held, on motion in arrest of judgment, that the omission in the declaration was supplied by the plea. We think, moreover, that such other formal defects, as are alleged by the appellant to exist in the declaration, were cured by the verdict, and under the Statute of Amendments and Jeofails, which latter statute provides that "judgments shall not be arrested * * * for any mispleading, insufficient pleading," etc. (1 Starr & Curt. Ann. Stat.—2d ed.—p. 390; *Keegan v. Kinnare*, 123 Ill. 280; 1 Chitty's Pl. pp. 682-684).

The agreement of the appellee to cause the premises to be put into a habitable condition and make the same ready for occupancy on or before April 15, 1902, was not an unrestricted agreement to make all such repairs, as were necessary to make the premises habitable before the commencement of the term. The latter part of the agreement in question qualifies and explains its meaning in the following words, to-wit: "meaning and intending hereby that the boards covering the windows and doors of the dwelling house shall be removed by the said party of the first part, the fixtures connected with the plumbing, and the dwelling house put in condition for occupancy." These words qualify and serve to explain both the preceding clauses, that is to say, the clause, "to cause said premises to be put into habitable condition," and also the clause to "make the same ready for occupancy." The true intent and meaning of the parties to a contract may be determined by an examination of the surrounding circumstances, under which the contract was made, and the acts of the parties themselves in reference to it. (*Hadden v. Shoutz*, 15 Ill. 581; *Piper v. Connelly*, 108 id. 646; *Louisville and Nashville Railroad Co. v. Koelle*, 104 id. 455).

The evidence shows that the place, rented by appellee to appellant, was a country place for use and occupation in the summer time only, and that, during the winter, the windows and doors of the dwelling house upon the premises were enclosed with boards, and that the plumbing was disconnected from the fixtures to which it was attached, in order to prevent freezing in the winter time. The evidence also shows that the appellant visited the premises before the contract was made, and went through the house, and knew that it had been closed during the preceding winter, and that the doors and windows had been barred up, and that the plumbing had been disconnected, and that the house required airing, and that the furniture had to be dusted and arranged, and the shades and curtains hung. He was aware of these facts when he entered into the lease. The evidence also shows

that appellee or her servants or agents removed the boards in question, and connected the plumbing, and aired the house, and arranged the furniture, so as to put the house in a condition to be occupied by the appellant. In other words, the proof tends to show that the covenant as to habitability and occupancy, interpreted according to the construction above given, was fully performed by the appellee before the appellant took possession.

It is claimed, however, on the part of the appellant, that the house upon these premises was a furnished house, and that, where a furnished home is leased for a short period as for a season or summer, there is an implied covenant or warranty on the part of the lessor that the premises are fit for habitation. The doctrine, thus contended for, is sustained by some of the authorities, and repudiated by others. We do not deem it necessary to discuss the doctrine, or to determine the question whether it should be adopted or approved by this court or not, inasmuch as the decision of the present case does not require such discussion. It is a general rule that, where there is an express covenant relating to the same matter as that embraced in the implied covenant, however qualified the latter may be, the implied covenant will be excluded upon the principle embodied in the Latin maxim, *expressum facit cessare tacitum*. (12 Am. & Eng. Ency. of Law,—1st ed.—p. 1013). Express covenants abrogate the operation of implied covenants in accordance with the rule of interpretation, that the expression of one thing in a contract is the exclusion of another. (8 Am. & Eng. Ency. of Law,—2d ed.—p. 83; *Finley v. Steele*, 23 Ill. 54). In the case at bar, there is an express covenant on the subject of making the furnished house upon the premises in question habitable and ready for occupancy by the beginning of the term, and, therefore, there is no room for an implied covenant. Where the minds of the parties have met and made an express agreement, the law does not enlarge and qualify this express agreement by implication. (Taylor on Landlord and

Tenant,—8th ed.—sec. 253). It is true that, although a lease contains express covenants, covenants may at the same time be implied, but the latter will be effective only when they are consistent with the express covenants. (12 Am. & Eng. Ency. of Law,—1st ed.—p. 1012). An implied covenant, that the house upon these premises was fit for habitation, would certainly be inconsistent with the restricted meaning, already given to the agreement or covenant as to habitability and occupancy.

Second—The defense, sought to be made by the appellant, was two-fold. It is claimed that, by the terms of the lease, appellee was bound not only to make the premises habitable and ready for occupancy at the beginning of the term on April 15, 1902, but was also obliged to keep them in repair during the running of the lease, and from the beginning to the end of the term. There is nothing to this effect in the express provisions of the lease. On the contrary, appellant agreed that he would keep said premises in good repair. Upon the assumption, however, that appellee was obliged to make repairs after the beginning of the term, appellant's first ground of defense is that the house was leaky, that the water came in through the roof, and around the windows, during the rains in the summer of 1902, and that the basement was not properly drained, so that the house was damp. It is also claimed that these conditions could have been obviated by making certain repairs during the running of the lease. The second ground of defense, urged by the appellant, is that he was evicted from a part of the premises. The alleged eviction proceeds from the contention of the appellant, that he was excluded from the tower, and the building on the beach, as described in the statement preceding this opinion, and from two of the rooms in the stable, connected with the dwelling house.

Appellant refused to pay any rent after the 19th of May, 1902, and some conversation took place between him and appellee and her agents, and some letters passed between them,

in reference to the making of certain repairs insisted upon by appellant. There was a conflict in the testimony as to the extent of the dampness and the leaks, and the absence of proper drainage, and also as to the alleged decay of certain portions of the porch around the dwelling. This was a matter for the consideration of the jury, and the jury have determined it against appellant. The court properly instructed the jury that, if they should believe from the evidence that any wrongful act of the appellee or omission to perform anything, required of her by her lease, was such as tended merely to diminish the beneficial enjoyment of the premises leased by the appellant, he was still bound for the rent if he continued to occupy the same, and that, if the appellant did not abandon the leased premises, his obligation to pay the rent therefor remained, but that he might show, as a matter of defense in what manner such beneficial enjoyment of the premises was diminished by such act or omission to act of the plaintiff, and recoup from the rent such damages, if any, he may have shown by the evidence he had sustained by reason of the wrongful act or omission to act of the plaintiff. Such is the law as has been declared by this court. (*Chicago Legal News Co. v. Browne*, 103 Ill. 317; *Barrett v. Boddie*, 158 id. 479; *Keating v. Springer*, 146 id. 481). Appellant offered no proof whatever on the question of damages, although the instructions given to the jury told them that he might recoup his damages, and were, therefore, exceedingly favorable to him. Inasmuch as appellant entered upon the premises, and enjoyed the use of them during the term of the lease, he could not defeat recovery by showing that there were certain leaks in the roof, or spots in the plaster, or on the walls. It is not claimed on the part of the appellant that the amount of the judgment recovered against him was too large; but it is claimed that he should not be required to pay anything at all for the use of the premises, occupied by him during the whole of the term mentioned in the lease. If the defects arising out of dampness and leakage were such as to

entitle the appellant to damages, then the jury were entitled to consider the difference in rental value, produced by such defects, in order to determine the amount of his damages by way of recoupment, but no evidence was produced upon the subject of rental value.

Upon the subject of eviction, the evidence is conflicting also. As to the rooms in the stable, appellant desired his coachman, with the latter's wife, to occupy certain rooms in the stable adjoining the hay loft, and, as it would be necessary to have a stove in the rooms so occupied by the coachman, some objection may have been made by the appellee or her agent to the putting of a stove in the stable. But it is not clear from the proof that there was an absolute refusal on the part of the appellee to allow the rooms to be so occupied. Appellant proposed to the appellee, or her agent, that he would himself erect a smoke-stack on the side of the stable to be used by the coachman. The evidence is not clear that appellee refused to allow this to be done, although the lease expressly provides that the appellant himself was not to allow any alterations to be made in the premises. As to the tower and the machine house, the lease expressly provides that the wind-mill on the tower was not in order to supply water, and was not to be operated. The lease also provides that the appellee was to keep her gardener upon the premises, and a horse and wagon in the barn to be used by such gardener. There is some proof, tending to show that the appellant desired to use the machine house as a bath house. The proof shows that it was not built for, nor intended to be used as, a bath house. The proof also tends to show that appellant desired to make use of some part of the tower as a bath house. Some objection may have been made to the use of the tower and machine house as a bath house because they were never intended for such a purpose, but there is evidence tending to show that appellee did not prevent appellant from using the tower, or the machine house, for any legitimate purpose. The testimony of the appellant tends to show that

he was locked out of the tower, and that he was not allowed to use the machine house, and that some restriction was placed upon his use of the rooms in the stable, so far as such use would require the putting in of a stove, and thereby running the risk of the destruction of the stable by fire. Appellant insists most strenuously that, having been evicted from the use of the tower, the machine house and these rooms in the stable, he was not obliged to pay any rent at all for the use of the dwelling house which he occupied, or of the balance of the premises. This court has held that the question, whether the acts of the landlord amount to an eviction of the tenant is a question of fact to be determined by the jury. (*Lynch v. Baldwin*, 69 Ill. 210; *Patterson v. Graham*, 140 id. 531). "Acts of a grave and permanent character, which amount to a clear indication of intention on the landlord's part to deprive the tenant of the enjoyment of the demised premises, will constitute an eviction." (*Hayner v. Smith*, 63 Ill. 430; *Keating v. Springer*, 146 id. 481). "The rule is well settled that the wrongful act of the landlord does not debar him from a recovery of rent, unless the tenant by such act has been deprived in whole or in part of the possession, either actually or constructively, or the premises rendered useless." (*Chicago Legal News Co. v. Browne*, *supra*). The question, whether or not there was an eviction, was submitted to the jury under the instructions, and, by the judgments of the lower courts, this question of fact has been settled against the appellant. At the request of the appellant, the court instructed the jury that any act of a permanent character done by the landlord, and which has the effect of depriving the tenant of the use of the premises leased, or of a part of them, would amount to an eviction.

After the appellant began to complain of the condition of the dwelling house upon the premises, the appellee employed certain persons, architects and carpenters, to examine the premises and see what repairs were necessary. The appellant seems also to have caused an examination to be

made. The persons, so employed to examine the premises, made reports, but there is evidence, tending to show that the appellant himself refused to permit repairs to be made, unless a lease should be given to him for the next year upon the same terms, substantially, as he was then occupying the premises, except that he was to occupy the rooms in the stable for the whole year, and to build a chimney at his expense, and to pay the water tax for the barn. In a written memorandum signed by him, after reciting the terms above stated for a lease for the coming year, appellant used these words: "If above accepted, will pay delinquent rent, and permit repairs." This tends strongly to show that, although the appellee had taken measures to ascertain whether the premises needed repairs or not, the appellant himself was unwilling to have them made, unless he should be given a lease for the coming year upon terms demanded by him.

The questions of fact, whether or not appellant was entitled to damages on account of the defective condition of the premises occupied by him, or whether or not he had been evicted from any part of the premises, were submitted to the jury under proper instructions, and are not subject to review by this court. Much complaint is made in regard to instructions, and in regard to the rulings of the court upon the admission and exclusion of evidence, but after a careful examination of the whole record, we are satisfied that the instructions and the rulings of the court upon the evidence conform substantially to the views heretofore expressed in this opinion, and that no errors were committed which operated to the injury of the appellant.

Accordingly, the judgment of the Appellate Court, affirming the judgment of the circuit court, is affirmed.

Judgment affirmed.

THE CHICAGO TERMINAL TRANSFER RAILROAD COMPANY
v.

PATRICK H. O'DONNELL, Admr.

Opinion filed December 22, 1904—Rehearing denied Feb. 18, 1905.

1. RAILROADS—*duty of railroad company in taking men to and from work.* It is the duty of a railroad company, in taking track men to and from their work, to furnish a reasonably safe place in which to ride.

2. SAME—*not negligence per se for workman to ride on top of box-car.* If the box-car furnished by a railroad company to transport its servants from work is overcrowded with men and tools it is not negligence *per se* for some of them to ride on top of the car.

3. SAME—*what does not preclude recovery for low-bridge accident.* The presence of tell-tales or whip-lashes suspended over the track does not preclude recovery for the killing of a section man struck by a low viaduct when standing on top of a box-car while returning from work, where it is not shown that he had notice of the viaduct or observed the tell-tales or appreciated their meaning.

4. EVIDENCE—*when refusal to allow witnesses to state that car was not overcrowded is not error.* Refusal to permit witnesses for defendant to state that the box-car furnished by it to transport its workmen from their work was not overcrowded is not error, where the jury are fully advised by the evidence as to the size of the car, the number of men therein and the space occupied by tools.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

JESSE B. BARTON, for appellant.

GEMMILL, BARNHART & FOELL, for appellee.

MR. JUSTICE HAND delivered the opinion of the court:

This is an appeal from a judgment of the Appellate Court for the First District affirming a judgment of the superior court of Cook county in a personal injury case for the sum of \$5000.

The first contention of appellant is, that the court erred in declining to take the case from the jury at the close of all the evidence.

The plaintiff's intestate, Frank DiAddario, on the 29th day of July, 1898, was in the employ of the defendant as a section hand, and on that day, in company with some fifty or sixty other laborers under a foreman named Michael Burke, was working upon the road of the defendant near One Hundred and Third street, in the city of Chicago. On that evening, at about six o'clock, he, in company with the other laborers, started to return to his home in the central part of the city upon a box-car attached to an engine. The men placed their tools in the car and the older men entered the car. The car being overcrowded, deceased and several other young men and the brakeman climbed up on top of the car and sat upon the running-board, which was located lengthwise of the car, near its center. As the car passed beneath the viaduct at Halsted street the head of the deceased came in contact with the lower edge of its roof with such violence that he was killed. The deceased had been in the employ of the defendant for eleven days, during which, with the exception of the day of the accident, the gang of laborers with which he worked had been taken by the appellant to their work in the south part of the city each morning in a passenger car as far as Western avenue and from there upon a flat-car, and were returned in the evening to the places where they left the car for their homes in the same manner. The home of the deceased was located near Halsted and Sixteenth streets, and he took and left the car just east of the viaduct at that point, at the Halsted street station. On the evening of the accident, when the engine and car arrived where the men were at work they were directed by the foreman to place their tools in the car and to get into the car. Several of the men testified the car was soon overcrowded, and others, who were upon the top of the car, that they and the deceased were unable to get into the car and for

that reason went upon the top of the car. It was the custom of the defendant to carry the deceased from its station near his home to his work in the morning and to return him to that station in the evening. While it may be conceded he was not a passenger, it was the duty of the defendant to furnish him a reasonably safe place in which to ride in going to and returning from his work, and if the car was overcrowded by other workmen so that he could not ride on the inside of the car, it was not negligence *per se* for him to take passage to his home upon the top of the car, and it was a question for the jury to determine, from the evidence, whether the car was overcrowded, and whether the deceased was justified, by reason of that fact, in going upon the top of the car. The deceased had never ridden beneath said viaduct, prior to the time of his injury, upon the top of a car, and there is no evidence that he knew of the existence of the viaduct. At the time of the injury the train was running at a considerable rate of speed and the smoke from the engine was blown back over the car, and the view of the viaduct was obstructed to such an extent thereby that persons upon the top of the car testified they could not see the viaduct and did not know they had reached that point upon the road until after the deceased was struck and killed. The witnesses upon the top of the car testified the deceased stood up just as the train reached the viaduct, and that had he remained in a sitting posture his head would not have come in contact with the roof of the viaduct. The distance from the top of the running-board, upon which the men were sitting, to the lower side of the roof of the viaduct was four feet and five inches. The deceased was not notified by the defendant or any of its servants, or otherwise, of the existence of the viaduct or the nearness of the lower side of the roof of the viaduct to the top of the car, otherwise than by tell-tales or whip-lashes suspended across the tracks a short distance west of the viaduct, and there was no evidence that the defendant knew of the train's near approach to the viaduct at

the time he was injured. It was proper to prove the tell-tales or whip-lashes were located across the track, as bearing upon the knowledge of the deceased that the train was about to pass under the roof of the viaduct, but without proof that they were observed by the deceased, or that he appreciated, by reason thereof, the fact the train was nearing the viaduct, their presence would not, as a matter of law, bar a recovery.

In view of all the evidence in the case we are of the opinion the court did not err in declining to peremptorily instruct the jury to return a verdict in favor of the defendant, but think the questions of the negligence of the defendant and whether the plaintiff's intestate was guilty of such contributory negligence as should bar a recovery were properly left to the jury.

It is next contended that the court erred in refusing to permit a number of the witnesses for the defendant to state that the car was not overcrowded. The jurors were fully advised by the evidence as to the size of the car, the space therein occupied by the tools and the number of men in the car, and from this testimony they were as well qualified to judge of the conditions inside the car as the witnesses. The question at issue was not whether more men could have been crowded into the car, but whether, owing to the crowded condition in the car, the deceased was guilty of negligence in going upon the top of the car. We do not think the refusal of the court to permit the witnesses to state whether or not the car was crowded, reversible error.

It is also contended that the court improperly refused certain instructions offered upon behalf of the defendant. We have examined the instructions given upon behalf of the defendant and those refused, and think that the jury were fully and fairly instructed as to the law of the case, and that the refusal of the offered instructions does not constitute such error as should cause a reversal of the case.

Finding no reversible error in this record the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

THE ANHEUSER-BUSCH BREWING ASSOCIATION

v.

FRED W. L. RAHLF.

Opinion filed February 21, 1905.

1. MORTGAGES—*when mortgage does not create a personal obligation.* If there is no promise or covenant by the mortgagor to pay the debt, perform the contract or do the act sought to be secured by the mortgage, the mortgage is a mere security, and no personal obligation can be enforced against the mortgagor.

2. SAME—*when provision of mortgage does not create a covenant.* A provision in a mortgage of saloon fixtures that the mortgagor shall retain possession of the property upon condition that he will buy and sell beer manufactured by the mortgagee and permit no other domestic beer to be used or sold on the premises, is not a personal covenant or promise by the mortgagor which the mortgagee may enforce by injunction.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

GOLDZIER, RODGERS & FROEHLICH, for appellant.

WINSTON, PAYNE & STRAWN, (RALPH M. SHAW, and MATT B. PITTMAN, of counsel,) for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The superior court of Cook county dissolved a temporary injunction granted in pursuance of the prayer of appellant's bill and dismissed the bill at appellant's cost for want of equity appearing on the face of the bill. On appeal to the Appellate Court for the First District the decree was affirmed, and this further appeal was prosecuted.

The material facts alleged in the bill are, that the complainant is a corporation of the State of Missouri, engaged

in brewing and vending beer; that the defendant applied to the Chicago branch establishment of complainant, representing that he desired to purchase a certain saloon in Chicago but was unable to pay the whole purchase price unless he could obtain a loan of \$1400, and desired to sell the beers of complainant exclusively if it would aid him by a loan of that amount; that complainant, being desirous of acquiring the custom of the saloon, loaned defendant \$1400, as a part of the purchase price of the saloon, to enable him to buy it, and upon the agreement that defendant would purchase complainant's beers for his business and would not permit any other domestic beer to be used or sold upon the premises; that the principal object of the loan was to secure the business, which would be of great profit to complainant; that defendant delivered to the complainant his eighteen notes, amounting to said sum, and drawing interest at six per cent, and to secure the payment of the notes executed a chattel mortgage of the fixtures and furniture of the saloon and basement under the same, and that said mortgage contained the following provision: "That the said mortgagor, or his executors, administrators or assigns, shall retain possession of said goods and chattels upon the condition that during such possession he will purchase of said Anheuser-Busch Brewing Association, for sale and use upon the premises hereinbefore described, the beer manufactured by said association, of a grade not inferior to that known to the trade as, and that during such possession he will permit no other domestic beer than that manufactured by said association to be used or sold upon said premises, and that he will pay to the said association for all the beer so purchased, in cash, upon delivery, the current market price of said association for its said beer in Chicago." That paragraph was followed by a condition that if defendant should make default in the payment of the notes or interest, or any part thereof, or should fail to purchase from the complainant, for sale or use upon the premises, beer manufactured by the complain-

ant or to pay for the beer so purchased, complainant might take possession of the property and foreclose the mortgage, and it was alleged that the defendant purchased the saloon and conducted it in accordance with the agreement until the bill was filed, but then threatened to use and sell domestic beer brewed by other brewers. The prayer of the bill was for an injunction restraining defendant from selling or permitting to be sold upon the premises any other domestic beer than that made by complainant.

Counsel for appellant say that they make no claim to relief on account of any agreement alleged in the bill other than the provision of the chattel mortgage. Leaving out of account, therefore, the alleged verbal agreement, the question arises whether the provision of the chattel mortgage above quoted is a covenant on the part of the defendant by which he assumed a personal obligation. The fact that the purchase of beer from the complainant and the exclusion of all other domestic beer was secured by the mortgage does not settle that question. While the existence of a debt or obligation, or a contract to be fulfilled or some act to be performed, is essential to the existence of a mortgage, it is not necessary that there should be any promise to pay the debt, fulfill the contract or perform the act. It is usual for the mortgagor to promise to pay the indebtedness or do the thing secured, either by a covenant in the mortgage or a separate promise or obligation. But that only adds a personal liability to the security. If there is no covenant or promise by the mortgagor the mortgage is a mere security and no personal liability can be enforced. It is a condition of this mortgage that if the defendant shall make default in the payment of the indebtedness represented by the notes or fail to purchase or pay for beer manufactured by complainant, it may take possession of the property and foreclose the mortgage, but there is nothing which can be construed as a personal covenant on the part of the defendant to purchase beer from the

complainant or to exclude other domestic beer. We regard the views of the Appellate Court on that subject as correct.

Appellee has filed an additional abstract of the record, consisting largely of a brief and opinion of a master in chancery concerning the right of complainant to an injunction, which is no part of the record in this case. The preliminary injunction was ordered by the court, and there is no authority for any proceeding before a master in the case. Nothing contained in the additional abstract is necessary or proper to determine whether the court was right in dismissing the bill for want of equity apparent on its face.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

MINNIE GERBRICH

v.

HENRY FREITAG.

Opinion filed February 21, 1905.

1. *WILLS—right of persons to jointly execute a will.* Separate wills may be written in one instrument and executed jointly by both parties, even though they devise their property reciprocally to each other, if the will is such that it may be given effect on the death of either as to the property of that one, and in such case the will may be probated on the death of either as his separate will, and on the death of the other be again probated as the will of the latter.

2. *SAME—joint will cannot suspend disposition of property until death of both parties.* Unless an instrument executed jointly by two persons as their wills is such that the disposition of the property is suspended until the death of both parties, so that it cannot be executed as the separate will of the one dying first, it is no objection that the wills are combined in a single instrument.

3. *SAME—when single instrument may be given effect as the separate will of each joint signer.* An instrument executed by husband and wife as their joint will, by which each devised his or her property, with the provision that each parcel of land should pass to the possession of the devisees at the death of the owner, subject to the requirement that each devisee should pay the survivor the cur-

rent rate of rent and pay the taxes and interest on the mortgage, passes the beneficial interest in the land to the survivor, which vests at the death of the owner, and is, in effect, two separate wills, which may be probated separately as the will of each maker.

APPEAL from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding.

LIVINGSTON & BACH, for appellant:

A will cannot be made by two or more persons unless it can be regarded as probated separately for each, without regard to the fact that another maker is still living. *In re Davis*, 120 N. C. 9.

Joint wills incapable of being separated as the separate will of each maker should not be probated. *State Bank v. Bliss*, 67 Conn. 317; *Walker v. Walker*, 14 Ohio St. 157.

Evidence of other than subscribing witnesses is admissible on appeal from probate of will in probate court on the question of fraud, compulsion or improper conduct. *In re will of Bonse*, 18 Ill. App. 437; *Walker v. Walker*, 2 Scam. 291; *Andrews v. Black*, 43 Ill. 256; *In re Davis*, 120 N. C. 9; *Betts v. Harper*, 39 Ohio St. 641; *Black v. Richards*, 95 Ind. 184; *Allin v. Bonner*, 8 Wis. 364; *Estate of Cawley*, 136 Pa. St. 628; *March v. Huyter*, 50 Tex. 243; *In re will of Diez*, 50 N. Y. 88.

E. E. DONNELLY, for appellee:

The law does not attempt to make wills for people, but its policy is to uphold wills made by them. A testator has the unquestioned right to bestow his bounty where and on whom he pleases, even where there are children. *Yorty v. Webster*, 205 Ill. 630.

Joint, mutual, double or reciprocal wills are valid, and should be probated as the separate will of the testator dying first. *Allin v. Bonner*, 8 Wis. 364; *In re will of Diez*, 50 N. Y. 88; *Betts v. Harper*, 39 Ohio St. 641; *Black v. Richards*, 95 Ind. 184; *Estate of Cawley*, 136 Pa. St. 628; *Rood*

on Wills, sec. 70; *Edson v. Parsons*, 155 N. Y. 555; Tiedeman on Real Prop. sec. 886a; Page on Wills, secs. 67, 68; 1 Underhill on Wills, secs. 11, 12; *In re Davis*, 120 N. C. 9.

A joint will may be, and ought to be, probated on the death of each testator as the separate will of the decedent. 1 Underhill on Wills, sec. 12; Page on Wills, sec. 68; Rood on Wills, sec. 71.

If either testator did not possess testamentary capacity when he joined in the execution of a will, or if he failed to comply with any statutory formality, the will is invalid as to him, although it is valid as to his co-testator. 1 Underhill on Wills, sec. 12.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

An instrument in writing executed by Ulrich VonGans and Hannah VonGans, husband and wife, was offered for probate in the county court of McLean county as the will of said Hannah VonGans, who died February 15, 1903, leaving surviving her, her said husband, Ulrich VonGans, five children by her former husband, Freitag, and Henrietta Ernestine VonGans, named in the instrument as the daughter of said Ulrich and Hannah. Appellant, who is one of the children of the former marriage and who was given by the instrument one dollar, with the statement that she had received other valuable consideration in advance, objected to the probate of the instrument as a will, both because it was not executed according to law and because it was not such an instrument as could be probated as the will of Hannah VonGans. The county court admitted the will to probate and appellant appealed to the circuit court, where it was again admitted to probate, and this is an appeal from the order of the circuit court.

The objection made to the instrument is that it is a joint will, incapable of being probated as the will of Hannah VonGans while the other maker, Ulrich VonGans, is living. Two

persons may at the same time execute separate wills disposing of their property, and there is no legal objection to uniting the wills in a single instrument if it is such that it may take effect upon the death of one of the parties so far as it relates to the property of that one. The fact that husband and wife devise their property reciprocally to each other by the same instrument, or that it is a joint or mutual will, does not deprive it of validity if the will can be given effect on the death of either so far as the property of that one is concerned. If it is of that character it may be probated upon the death of one as his or her separate will, and upon the death of the other can be again proved as the separate will of the other. Unless the provisions of the instrument are such that the disposition of the property is suspended after the death of one until the death of the other, so that it cannot be executed as the separate will of the deceased party, it is no objection that there is but a single instrument. *In re Davis*, 120 N. C. 9; *Betts v. Harper*, 39 Ohio St. 639; *Estate of Cawley*, 136 Pa. 628; *Evans v. Smith*, 28 Ga. 98.

In this case the instrument was declared by the parties to be their joint last will and testament. Hannah VonGans was the owner of two hundred and eighty acres of land, and also of an undivided one-half of one hundred and nineteen acres of which she and her husband, Ulrich VonGans, were tenants in common, he owning the other undivided one-half. These lands were their only property. The will provided that the just debts and funeral expenses of the makers should be paid, including a mortgage for \$10,000 on the lands, and directed that the five children to whom the lands were devised should each assume the sum of \$2000, or such equalized portion of the mortgage as might remain unpaid at the time of their death. The lands were devised to four of the children of Hannah VonGans, excluding appellant, and to Henrietta Ernestine VonGans, in tracts of eighty acres each, except one tract which was seventy-nine acres. One of the daughters was to pay to John Freitag, one of the sons, a note

given to the testator and testatrix for cash loaned to her husband. The will contained the following provision: "Each parcel of said land to pass into the possession of our devisees at our, one or the other, demise, and each devisee to pay the survivor a current rate of rent per acre on said land so devised during his or her natural life, together with the taxes, interest on mortgage," etc.

The will was written by a friend of the parties who had been in the grocery business and who was unskilled in such matters. They had been in the habit of trading with him, and he wrote the will from deeds furnished by them. While the forms of expression used are not the same as would have been employed by one more experienced in writing wills, we find no especial difficulty in determining the intent of the parties. By the will each one devised his or her own property, with the provision that each parcel should pass into the hands of the devisees at the death of the owner, but such devisee was to pay to the survivor, during his or her natural life, the current rate of rent per acre, as well as the taxes and interest on the mortgage. The possession being subject to the payment of the current rate of rent, together with the taxes and interest on the mortgage or such part as might remain unpaid, the survivor would be entitled to the full beneficial use of the land for his or her life. That beneficial use in the lands devised by Hannah VonGans became vested in Ulrich VonGans upon her death, and it would only come to an end and the land be freed from the rent charge upon his death. There is nothing in these provisions which suspended the disposition of the property or the operation of the will until the death of Ulrich VonGans, but the instrument is, in effect, two distinct wills, which may be probated separately and be successively proved as the separate will of each maker.

It is claimed that the proof did not show a legal execution of the will. The evidence was that the makers of the will were Germans but they understood English. The person

who drew the will read it to them in English and also explained it in German. He called in the witnesses and asked the makers if they were satisfactory and if they should sign as witnesses, and the makers gave their assent by nodding their heads. The makers of the will took it away with them and kept it six or seven years, and the evidence sufficiently proves that they understood its contents and executed it in accordance with the law.

Appellant offered the testimony of herself and her husband that one of the witnesses testified differently on the application to probate the will in the county court from his testimony in the circuit court as to whether the will was signed before he was called in as a witness. An objection to the offer was sustained. If this testimony had been admitted it could not have affected the result. In fact, appellant proved by a third subscribing witness to the will that the man who drew it called the witnesses into the room and introduced them to the testator and testatrix, and stated that they had drawn their will and wanted the witnesses to acknowledge it, and they nodded their assent.

Appellant also offered to prove by Ulrich VonGans that after the will was drawn and presented to him for signature he refused to sign until he was assured he was to receive the property in case of his wife's prior death. Ulrich VonGans was not present at the trial, but the objection was not upon that ground, and it is insisted that the court erred in refusing to entertain the offer. The question whether any fraud was practiced upon Ulrich VonGans was not involved in the offer to probate the will of Hannah VonGans, and the offered evidence would not tend to prove that she was deceived in any manner. Besides, as we interpret the will, it gave him the full beneficial use of the property during his lifetime, and he was not deceived if that representation was made to him.

The judgment of the circuit court is affirmed.

Judgment affirmed.

CINCINNATI, INDIANAPOLIS AND WESTERN RAILWAY CO.

v.

THE PEOPLE *ex rel.* Wallace Young, County Treasurer.

Opinion filed February 21, 1905.

1. TAXES—*when the levy of county tax is insufficient.* A resolution of the county board directing the levy of seventy-five cents on each \$100 valuation as a county tax for all the various purposes for which the county might require money, and without stating the amounts required for each purpose separately, is not such a levy as will sustain the tax.

2. SAME—*when district road tax is invalid.* The preliminary steps necessary to constitute a valid levy by the board of supervisors of the arrearages of a district road tax of a town under the labor system are lacking where there is no affidavit of delinquency by the overseer of highways and nothing to show that the tax list had ever been in his hands.

3. SAME—*filing certified copy of tax levy ordinance with county clerk is essential to validity of city tax.* The filing of a certified copy of the tax levy ordinance with the county clerk is essential to the validity of the city tax, and if the paper filed does not purport to be a certified copy the court has no power to permit the addition of a certificate to the paper under the guise of an amendment.

APPEAL from the County Court of Clark county; the Hon. EVERETT CONNOLLY, Judge, presiding.

GEORGE W. FISHER, for appellant.

B. M. DAVIDSON, State's Attorney, for appellee.

MR. JUSTICE CARTWRIGHT delivered the opinion of the court:

The county court of Clark county overruled the objections of appellant to the application of the county collector of said county for judgment against appellant's property for the county tax, the district road tax of the town of Westfield and the taxes levied by the city of Casey, and rendered judgment against said property for the several amounts of said taxes. The case is brought to this court for review by appeal.

The authority under which the county clerk extended the county tax was a resolution of the board of supervisors directing that seventy-five cents on each \$100 of the total taxable property of the county, as equalized by the county board of review for the year 1903, should be levied as a county tax for county purposes for the current year. The tax was levied for all the various purposes for which the county might require money, and the objection was that the resolution did not state the amounts required for the several purposes separately. In the case of *Chicago, Burlington and Quincy Railroad Co. v. People*, (*ante*, p. 458,) it was decided that such a levy was not a valid foundation for a tax. The objection ought to have been sustained.

The district road tax of the township of Westfield was extended by the county clerk from a paper which the town clerk testified was taken by the supervisor of the township and returned to the board of supervisors. Section 83 of the Road and Bridge law, under which the town was acting, authorizes the commissioners of highways to levy a road tax, and section 90 requires them to appoint an overseer for each road district, whose duty it is to enforce payment of the tax in labor. Section 108 requires the overseer to give notice to each person in his district against whom a land, railroad property or personal property road tax is assessed, of the time when and the place where he may appear and pay the tax in labor. By section 110 each overseer is required to deliver to the supervisor of his town, at least five days previous to the annual meeting of the board of supervisors, the tax list, with his affidavit thereto that on all tracts of land or railroad property on such list opposite which the word "paid" is written such tax is paid, and that on all tracts of land or railroad property on such list opposite which the word "paid" is not written such tax is due and remains unpaid. It is made the duty of the board of supervisors, by section 117, to cause the amount of the arrearages returned by the overseer to be levied on the lands returned, and to be collected in

the same manner as other taxes. In this case the commissioners of highways levied a tax and made the list, but there was no overseer of highways and no affidavit as required by the statute, so that the preliminary steps to constitute a valid levy by the board of supervisors were wanting. The court erred in overruling the objection.

The city taxes objected to were extended by virtue of a paper filed in the office of the county clerk purporting to be an ordinance of the city of Casey passed and approved September 7, 1903. The ordinance was entitled "The annual tax levy ordinance for the year 1903," and it purported to levy upon all the property subject to taxation within said city, certain sums therein specified for salaries and other current expenses, and for the payment of city bonds and interest thereon. It made no reference to appropriations, but it was admitted that an appropriation ordinance had been duly passed and published as required by law. The ordinance was not authenticated in any manner or certified to by the city clerk, and there was nothing on the paper showing that it was a copy of any ordinance. Section 1 of article 8 of the act for the incorporation of cities and villages provides that the city council shall annually, on or before the third Tuesday in September, ascertain the total amount of all appropriations for corporate purposes legally made and to be collected from the tax levy for the fiscal year, and by an ordinance specifying in detail the purposes for which such appropriations have been made and the sum or amount appropriated for each purpose, respectively, to levy the amount so ascertained upon all the property subject to taxation within the city or village. A certified copy of such ordinance is to be filed with the county clerk, when it becomes his duty to ascertain the necessary rate per cent and extend the tax. In this case it did not appear that the city clerk had ever attempted to make any certificate or to file a certified copy of an ordinance, or even any paper which indicated that it was a copy. There was nothing about the paper to show whether

it was a copy or an original ordinance. On the hearing leave was given to the counsel for the People to amend by adding the clerk's certificate to the ordinance, but no amendment appears to have been made. By the statute any irregularity or informality, or any omission or defective act of the clerk, might have been corrected, but as nothing which purported to be a copy of the ordinance levying the tax had been filed with the county clerk there was nothing in the way of a certificate to be amended. The paper filed did not give to the county clerk any apparent authority to extend the tax, and under the authority of *Village of Russellville v. Purdy*, 206 Ill. 142, the leave to amend was improper. The only authority for extending a tax is some paper which purports to be a certified copy of an ordinance levying a tax. Under the established rules it was error to overrule the objection to these taxes.

The judgment of the county court is reversed and the cause is remanded.

Reversed and remanded.

THE EAU CLAIRE CANNING COMPANY

v.

THE WESTERN BROKERAGE COMPANY.

Opinion filed February 21, 1905.

1. APPEALS AND ERRORS—*when receivers may sue out a writ of error in name of corporation.* Receivers of an insolvent foreign corporation may prosecute a writ of error in this State in the name of the corporation to reverse a judgment recovered against it before its dissolution, where such course is authorized by the laws of the foreign State and by an order of the court having jurisdiction of the receivership, and is not against the public policy of Illinois.

2. CONTRACTS—*when bought and sold notes establish a contract.* Where a broker representing both parties enters no memorandum of the sale in his book or the book is not produced, the bought and sold notes together, if they agree, establish the contract.

3. *SAME—immaterial variance between bought and sold notes does not vitiate contract.* An immaterial variance between bought and sold notes does not vitiate the contract, nor does a material variance if the same may be explained by the usages of trade.

4. *SAME—effect of customs and usages on contract.* One employing a broker to act for him in a particular market must be taken as intending that the business will be done according to the usages and customs of that particular market.

5. *SAME—what is not a material variance between bought and sold notes.* That the note delivered to the purchaser evidencing a broker's sale of canned tomatoes contained the words "usual guaranty against swells and quality" and "terms regular," which were not in the note delivered to the seller, does not avoid the contract, where the evidence shows that all sales according to the usage of the particular market were made under such terms unless otherwise provided, and that the seller knew of such usage when he employed the broker.

6. *SAME—bought and sold notes are to be construed together.* Bought and sold notes executed at the same time and evidencing the same transaction will be construed as one instrument, and in so doing, force is to be given, if possible, to the language of both.

7. *SAME—when contract will be treated as ratified.* A principal who fails to repudiate a sale by his broker within a reasonable time after receiving the sale ticket evidencing the transaction must be held to have ratified the transaction and is bound thereby.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JONAS HUTCHINSON, Judge, presiding.

This is an action of assumpsit, brought by writ of attachment November 11, 1901, in the Superior Court of Cook county by the defendant in error, the Western Brokerage Company, a corporation organized under the laws of Iowa, against the plaintiff in error, the Eau Claire Canning Company, a corporation organized under the laws of Michigan, (the latter corporation being engaged in canning tomatoes and other vegetables and fruits in the city of Eau Claire in Michigan,) to recover damages for breach of contract. The declaration consisted of two special counts and three com-

mon counts for money laid out and expended, for money had and received to the use of the plaintiff, and for balance due on account stated. The defendant pleaded the general issue, and later by leave of court filed an additional plea, denying the execution and delivery of the "writings in said declaration and the several counts thereof mentioned." By agreement of parties a jury was waived, and the cause was submitted to the court for trial upon an agreed statement of facts, with a reservation to each party of the right to introduce further testimony, not inconsistent with the stipulated and agreed statement of facts.

On July 24, 1903, the trial court found the issues for the plaintiff, and assessed plaintiff's damages at \$3500.00, and costs. An appeal was taken to the Appellate Court for the First District from this judgment, and the Appellate Court has affirmed the judgment. An appeal was taken to this court from the judgment of affirmance so entered by the Appellate Court, but said appeal was dismissed, and the present writ of error has been sued out from this court by the present plaintiff in error for the purpose of reviewing said judgment of the Appellate Court.

The first special count of the declaration charges that, on June 24, 1901, at Chicago, the plaintiff below, defendant in error here, at the request of the defendant below, plaintiff in error here, bargained for and agreed to buy of the defendant 5000 cases of No. 3 standard tomatoes upon the following terms and conditions: Said 5000 cases of standard No. 3 tomatoes should be delivered to plaintiff within a reasonable time thereafter free on board cars at the factory of defendant at Eau Claire in Michigan, and the plaintiff should pay for the same the sum of seventy-five cents per dozen, less fifteen cents per cwt. and less one and one-half per cent discount for cash; that, in consideration of the premises, the defendant on the day aforesaid, at the said city of Chicago, promised that defendant would, within a reasonable time, ship to such persons as plaintiff might direct said amount of

tomatoes; that, although a reasonable time for that purpose has long since elapsed, and plaintiff was always, during and since that time, ready and willing to accept a delivery of the tomatoes aforesaid, and to pay for the same as aforesaid, yet the defendant did not, nor would within such reasonable time, or afterwards, procure to be delivered or shipped for the plaintiff, the tomatoes aforesaid, or any tomatoes whatsoever; but refused and still refuses so to do, to the damage of the plaintiff, etc.

The second special count alleges that, on the day and year aforesaid, the plaintiff, at the request of the defendant, made by and through its duly authorized agent and broker, to-wit, W. S. Knight & Co., a bargain with the defendant to buy of it, and defendant then and there sold to the plaintiff a large amount of standard tomatoes, to-wit, 5000 cases, to be delivered by the defendant free on board cars at the city of Eau Claire, and to be paid for by the plaintiff on the delivery thereof, at the rate of seventy-five cents per dozen, less fifteen cents per cwt. freight allowance, and less a deduction of one and one-half per cent for cash; that in consideration thereof said defendant, through its agent and broker aforesaid, promised the plaintiff to deliver said tomatoes to it, as aforesaid, when the tomatoes of 1901 were packed; and although the tomatoes of 1901 had long since been packed, and although the time for the delivery of said tomatoes, specified in the contract aforesaid, had long since elapsed, and although the plaintiff had always been ready to accept and receive the said tomatoes, and to pay for the same at the prices aforesaid, yet the defendant did not nor would it make a delivery of said tomatoes, but refused so to do.

The facts embodied in the stipulation above named, and shown by the testimony introduced in connection therewith, are substantially as follows:

During the month of May, 1901, and before the 24th day of said month, R. W. Reese, secretary of the Eau Claire Canning Company, called upon William H. Eagle, president

of W. S. Knight & Co., an Illinois corporation, engaged in business as wholesale brokers and commission merchants at 42 River street, in Chicago, stating that he, Reese, was connected with the Eau Claire Canning Company of Michigan and wished W. S. Knight & Co. to sell his goods for him as brokers, saying, however, at that time that the canning company had not packed anything, and that, when they were ready to pack, they would quote prices to Knight & Co. The defendant in error, a corporation of Iowa, engaged in the brokerage business, had an office in Chicago, and had in its employ, as buyer, one Dudley Smith, who was authorized to make contracts and purchases on its behalf; Reese was authorized by the canning company to write and execute on its behalf the letters hereafter referred to, and to bind the company by the statements contained in said letters, and to negotiate in its behalf the transactions hereinafter mentioned, and to represent it in all matters and things therein set forth. There ensued thereafter certain correspondence between the said Knight & Co. and plaintiff in error.

On May 24, 1901, plaintiff in error, by Reese its secretary, wrote W. S. Knight & Co. a letter, reminding them that Reese had called upon them a few days before regarding the canned goods arrangement, sales, etc., and making inquiry regarding the kind of boxes to be used in the shipping of their goods, and stating that they had been told that brokers preferred a certain kind of box, and requested that they should hear from Knight & Co. with reference to that subject. On May 25, 1901, Knight & Co. replied, giving their opinion as to the kind of box to be used, and saying: "Future tomatoes are being offered here now at seventy-five cents regular terms, delivered, but the trade are not taking hold of them very freely at present. When you are ready to name prices on your pack, we hope you will hand them to us promptly." On June 13, 1901, W. S. Knight & Co. wrote plaintiff in error saying: "If we hear in time, think we can sell one of our largest grocery houses here 2500 cases of

your tomatoes for future delivery, if you will make the price seventy-two and one-half cents regular terms delivered here, guaranteeing the quality strictly standard, goods to be shipped when packed," and, after advising plaintiff in error to take seventy-two and one-half cents, the said letter closes as follows: "If you want this order, please write us promptly on receipt of this letter." On June 14, 1901, the plaintiff in error, by Reese, its secretary, replied to the last letter as follows: "Your favor of the 13th inst. just at hand. Considering the poor outlook for a tomato crop, and believing the output will be materially cut short, we cannot accept your offer of seventy-two and one-half; we will make you an offer, however, of seventy-five cents f. o. b. at our factory in lots of 5000 cases and 2500 cases. Trusting we may hear favorably on this proposition, we remain," etc. On June 17, 1901, Knight & Co. replied to the last letter as follows: "We are to-day in receipt of your favor of the 14th and note you do not care to sell tomatoes under seventy-five cents, f. o. b. factory. It is impossible to obtain this price, as there are a number of packers in the market trying to sell at seventy-five cents delivered here, and in some cases they are willing to take seventy-two and one-half. Our buyer is Sprague, Warner & Co., who, as you know, are the largest grocers here, and it would be very desirable to get your goods in with them. We have succeeded in getting them to renew their offer of seventy-two and one-half cents delivered here, which is the best they will do. We trust you will reconsider the matter, and enter this order for 2500 cases for them." On June 19, 1901, plaintiff in error replied to W. S. Knight & Co. as follows: "In reply to your letter of the 17th inst. we beg to state that we have been offered on 5000 cases three pound tomatoes seventy-five cents delivered. We are willing to make the concession to our former letter regarding the freight, and will furnish them to your house f. o. b. Chicago, at above quotation. Considering the backward condition of the crop we think prices will advance in-

stead of decrease, and as we are anxious to market our pack through your house, we trust you will be able to reach the figures above named."

On June 20, 1901, Knight & Co. replied to said letter of June 19, as follows: "Replying to your favor of the 19th. We are unable to sell Sprague the tomatoes at seventy-five cents delivered, neither can we find any other buyer in this market at this price. We now have a proposition from an Iowa jobber, who offers seventy-five cents less fifteen cents per hundred freight for 5000 cases. This concern have several stores in Iowa, and they would be good people to get your goods in with. Please let us know the rate of freight you can get from Eau Claire to Chicago, also the Mississippi and Missouri river points. Please let us know promptly whether or not you will accept this offer." On June 21, 1901, plaintiff in error, by Reese, its secretary, wrote Knight & Co., in reply to said letter of June 20, as follows: "Referring to yours of the 20th inst. Will state that, if you can secure order for 5000 cases three pound tomatoes at seventy-five cents we will allow fifteen cents per cwt. freight."

The last letter of June 21, 1901, was received by W. S. Knight & Co. on Saturday, June 22, 1901, and on Monday, June 24, Mr. W. H. Eagle, president of Knight & Co., called upon Dudley Smith, the buyer of the Western Brokerage Company, and presented to said Smith the letter of June 21, aforesaid. The testimony of Eagle shows that, before writing the letter of June 20, 1901, to the plaintiff in error, he had secured from Smith an offer in behalf of the Western Brokerage Company in the form transmitted by him to the canning company in the letter dated June 20, 1901, the letters from Knight & Co. to the Eau Claire Canning Company having been written by said Eagle. Eagle also testifies that, when he called upon Smith on Monday, June 24, 1901, "I showed him the letter and he accepted the proposition," referring to the letter from the plaintiff in error dated June 21, 1901.

Thereupon, on Monday, June 24, 1901, upon the acceptance by Smith of the proposition contained in the letter of June 21, 1901, the following memorandum or sale ticket was given by Eagle, as representing W. S. Knight & Co., to Smith, as representing the Western Brokerage Company, to-wit:

"CHICAGO, June 24, 01.

"Sold to Western Brokerage Co.,

For account of Eau Claire Pkg. Co., Eau Claire, Mich.

"5000 c/s Stand. 3lb tomatoes 75 f. o. b. factory, less 15c per cwt. frt. allowance. Cash, less 1½%. Pack of 1901. Shipped when packed.

W. S. KNIGHT & Co."

At the same time Dudley Smith delivered to Eagle a memorandum in the following form:

"WESTERN BROKERAGE Co., 42 RIVER STREET,

CHICAGO, June 24, 1901.

"W. S. Knight & Co.—No. 659.—for Western Bro. Co.

Bought of Eau Claire Packing Co., Eau Claire, Mich.

Charge to Western Brokerage Co., Chicago.

Shipping instructions when packed. When ready to ship.

Terms regular, less 1½%, cash 10 days.

Charge and invoice to parties named above but send bill of lading and invoice to Western Brokerage Co., 42 River street, Chicago, for their O. K.

5000 cases Std. 3lb tomatoes at 75 cts. doz. f. o. b. factory, with an allowance of 15 cts. cwt. on freight.

Pack 1901—Usual guarantee against swells and quality.

For Western Brok. Co.

Brokerage: Regular.

WESTERN BROKERAGE Co.,

Per DUDLEY SMITH."

Thereafter on the same day W. S. Knight & Co. sent to plaintiff in error the following telegram, to-wit:

"June 24, 1901.

"To Eau Claire Packing Co., Eau Claire, Mich.:

"Letter received. Have sold five thousand tomatoes, your price. terms.

W. S. KNIGHT & Co."

It was stipulated between the parties that, although the telegram was addressed to the Eau Claire Packing Company, it was received by the Eau Claire Canning Company, plaintiff in error.

On the same day W. S. Knight & Co. wrote the following letter to the plaintiff in error, to-wit:

"CHICAGO, June 24, 1901.

"*The Eau Claire Canning Co., Eau Claire, Mich.:*

"GENTLEMEN—Replying to your favor of 21st. We wired you to-day that we had sold the 5000 cases of tomatoes, for which we now enclose sale ticket. We enclose a card showing the different wholesale grocery houses these people represent; and they will probably ask you to ship part of the lot to several of them when they are ready.

"We presume you are working up the matter of freight rates to the different points we asked for last week, and that we will hear from you very soon.

"It is possible we can sell 5000 cases more on this basis, and if you care to have us do so, please let us know by return mail.

"Yours truly,

W. S. KNIGHT & Co.

"P. S.—Please wire us if you will sell 5000 more same price."

The sale ticket enclosed in the last letter, dated June 24, 1901, was in the following terms:

"MEMORANDUM,

"CHICAGO, June 24, 1901.

Sales by

W. S. Knight & Co.

For account of

Eau Claire Packing Co.

As per telegraphic advices.

Western Brokerage Co.

5000 cases 3lb tomatoes. 75 cts. F. o. b. factory. Less 15 cts. per 100 lbs. freight allowance, cash less 1½ per cent. To be shipped when packed, pack of 1901. Season's guarantee on swells."

On June 26, 1901, the Eau Claire Canning Company, by Reese, its secretary, wrote as follows:

"EAU CLAIRE, MICH., June 26, 1901.

"*Mess. W. S. Knight & Co., Chicago, Ill.:*

"GENTLEMEN—Referring to yours of recent date, will say we have looked up freight rates to Mississippi river points, and find that on car lots they are 17 cts. per cwt. * * * Have been looking up crop prospects regarding outlook for tomatoes, and find it to be decidedly poor. Out of a contract of nearly 200 acres of tomatoes, we will not be able to secure more than one-half that amount, and we do not feel like contracting any farther futures less than 75 cts. straight f. o. b. at our factory. Should a change for the better come, will let you know.

"Yours truly,

EAU CLAIRE CANNING CO.,

Per R. W. REESE, Sec'y."

On July 11, 1901, Knight & Co. wrote plaintiff in error that they had a buyer for 1000 cases of future tomatoes, who would pay seventy-five cents f. o. b. factory, "less your Chicago rate of freight, which we understand to be nine cents;" and closed their letter as follows: "Please let us know by return mail if you wish to take this order." On July 15, 1901, the plaintiff in error wrote to W. S. Knight & Co. saying: "Our tomato crop will be a failure. The extended drouth following the extreme cold weather of a late spring has destroyed almost the entire prospect, and I am sorry to inform you we are in no condition to make any proposition at all." On July 21, 1901, plaintiff in error, by its secretary, R. W. Reese, wrote to W. S. Knight & Co. saying: "The continued drouth leads me to believe we shall have no pack on tomatoes at all in this section. The extreme heat in connection with the parched condition of the earth is killing off most of our vegetation. We shall have a good pack on peaches. Trusting we may yet do some business with you," etc.

According to Eagle's testimony, Reese called at the office of Knight & Co. in Chicago several times in July and August, 1901, and said that the prospects were bad for the tomato crop, and that he did not know what they were going to be able to do. Eagle says: "I suggested to him that he ought to go to the Western Brokerage Company; they were here in town and right handy, and he promised to do it. * * * Later on he said he didn't think he was going to get any, and couldn't fill the contract of the Western Brokerage Company, and I advised him to go and see them and make a settlement with them. He promised to do so." Reese, in his testimony, does not deny that he had a talk with Eagle. On September 23, 1901, defendant in error, the Western Brokerage Company, wrote Knight & Co. as follows: "Please refer to our contract made through you with the Eau Claire Packing Company for 5000 cases three pound standard tomatoes. Please advise us when these tomatoes will be ready for shipment, so we can give you proper shipping instruc-

tions." On September 24, 1901, W. S. Knight & Co. wrote a letter to the plaintiff in error, enclosing the above letter of September 23, 1901, and saying: "Please let us know promptly what to say to these people in the matter. When your Mr. Reese was here last, he talked about selling some peaches, promised to send us samples. We learn that he had samples in the hands of one of our competitors, Fisk-Kyle Co. We were under the impression that we represented your company exclusively in this market, and would be pleased to know if we are in error in thinking so."

The letter of September 24, 1901, with its enclosure, was received by the plaintiff in error, but no reply was made to either of the said letters. Thereupon, on October 16, 1901, Dudley Smith went to Eau Claire for the purpose of giving shipping directions with reference to the tomatoes, called upon Reese, and gave him such directions; and thereupon Reese informed Smith that the canning company had no contract with defendant in error, the Western Brokerage Company, for the delivery of tomatoes, and had not accepted any order from the said Knight & Co. for the account of said Western Brokerage Company, and thereupon refused to carry out the contract, which the said Western Brokerage Company claimed to have been made with Knight & Co., as agent of the Eau Claire Canning Company.

On returning from Eau Claire, Smith wrote Knight & Co. the following:

"CHICAGO, Oct. 17, 1901.

"Messrs. W. S. Knight & Co., Chicago:

"GENTLEMEN—We have your contract under date of June 24, reading as follows: 'Sold to the Western Brokerage Company, for account of Eau Claire Packing Company, Eau Claire, Mich., 5000 cases standard three pound tomatoes at seventy-five cents per dozen f. o. b. factory, less fifteen cents per cwt. freight allowance, cash, less one and one-half per cent, pack of 1901, to be shipped when packed.' In taking this up with these packers to give them shipping instructions, they advised us that you have made no contract with them, and they have not accepted an order from you for that account. This, of course, is a great surprise to us, as these tomatoes were purchased by us in good faith, and we have given sales ticket, confirming the purchase to the Western Grocer Company, Kansas City,

Mo., and we must request that you take this up at once with the packers, and have shipment made of these 5000 cases tomatoes covered by your contract. Please have them shipped by the Big Four railroad via Peoria, c/o Iowa Central, c/o Chicago Great Western at Marshalltown. Trusting you will give this your immediate attention and have these tomatoes shipped at once," etc.

Upon receipt of this letter Eagle went to Eau Claire to ascertain upon what facts plaintiff in error based its action in advising Mr. Smith that no contract existed for the sale of the tomatoes in question. Eagle saw Reese at Eau Claire, and Reese says: "Eagle asked me why, or when I was going to ship the tomatoes we had sold to the Western Brokerage Company, and I said we hadn't sold any tomatoes to the Western Brokerage Company, that we had no contract for any such sale. That was the last talk I had with Mr. Eagle."

It was stipulated that the Western Brokerage Company was at all times ready, able and willing to receive the tomatoes, and to pay for the same in accordance with the terms set forth in the ticket hereinbefore referred to.

It was stipulated between the parties that no tomatoes were delivered in pursuance of said negotiations, and that, if the defendant in error was entitled to recover, its damages should be assessed at \$3500.00.

SCOTT, BANCROFT, LORD & STEPHENS, for plaintiff in error.

CALHOUN, LYFORD & SHEEAN, for defendant in error.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

First—At the December term, 1904, of this court, the defendant in error, the Western Brokerage Company, made a motion to dismiss the writ of error herein, which motion was reserved to the hearing, and will now be considered.

The ground, upon which it is sought to dismiss the writ of error, as the same is stated in the motion, is as follows: "For the reason that it appears from the record herein that at

and prior to the time of the suing out of said writ of error, the plaintiff in error was civilly dead and absolutely extinct, and for that reason incapable of suing out said writ of error."

The present plaintiff in error prosecuted its appeal herein from the judgment of affirmance entered by the Appellate Court, but the present defendant in error made a motion in this court to dismiss the appeal upon the grounds, first, that the appeal bond was not filed within the time allowed by the Appellate Court, and second, because the proceeding was an attempt by certain receivers in voluntary dissolution to conduct an appeal in the name of a dissolved and extinct corporation. This court dismissed the appeal upon the first ground above stated, but passed no opinion upon the second reason above assigned for the dismissal of the appeal. Thereafter the present plaintiff in error, then the appellant in the Appellate Court, withdrew the record, and sued out this writ of error in the name of the "Eau Claire Canning Company, plaintiff in error."

After the judgment of the Superior Court of Cook county was rendered in this case on July 24, 1903, proceedings were brought, under the statutes of Michigan providing for the voluntary dissolution of corporations, in the circuit court of Berrien county, Michigan, for the voluntary dissolution of plaintiff in error, Eau Claire Canning Company, the defendant in the trial court, and three persons, named Sharp, Lovell and Whalen were appointed receivers by decree entered by said circuit court on May 21, 1904. By the latter decree it was provided "that said corporation (Eau Claire Canning Company), shall be and is hereby dissolved." The statutes of Michigan here referred to are set forth in full in the record of the Appellate Court, and a certified copy of said decree of dissolution and of said statutes are attached to the bond presented by the plaintiff in error on its application for a *supersedeas*. The defendant in error herein contends that, by virtue of the decree of the Michigan circuit court, and the statute, under which the same was rendered, the corporation,

known as the Eau Claire Canning Company, was pronounced civilly dead, and that its corporate existence thereby ceased, so that it became absolutely extinct, and the power to collect its assets, pay its debts, and wind up its affairs, including the power to sue and be sued, became vested in its legal successors or trustees or receivers, and that as a consequence a suit could not be maintained in its name in the courts of Illinois.

In this State the suing out of a writ of error is the beginning of a new suit. (*Ripley v. Morris*, 2 Gilm. 381; *International Bank v. Jenkins*, 107 Ill. 291; *Singer & Talcott Stone Co. v. Hutchinson*, 176 id. 48.) Therefore, the suing out of the present writ of error is the beginning of a new suit in this court by the plaintiff in error, the Eau Claire Canning Company, a Michigan corporation, and not by Sharp, Lovell and Whalen, the receivers of plaintiff in error, as appointed by the Michigan circuit court. The question is, whether this suit is properly begun, or this writ of error is properly sued out, in the name of the corporation itself.

It is true that, by the terms of section 8 of the Michigan act in regard to the voluntary dissolution of corporations, "a decree shall be entered dissolving such corporation and appointing one or more receivers of its estate and effects; and such corporation shall thereupon be dissolved and shall cease." But section 36 of that act provides as follows: "Whenever a receiver of the property and effects of a corporation has been appointed, before its dissolution or afterwards, new suits may be brought and carried on by any such receivers either in their own names, or in the name of the corporation for which they shall have been appointed." It is also shown by the record herein that section 8 of chapter 230 of the compiled laws of Michigan, a copy of which is attached to the *supersedeas* bond, provides "that all corporations, whose charters shall expire by their own limitation or shall be annulled by forfeiture or otherwise, shall, nevertheless, continue to be bodies corporate for the term of three years after the time when they would have been so dissolved,

for the purpose of prosecuting or defending suits by or against them. * * * But not for the purpose of continuing the business for which such corporations have been or may be established." In addition to the statutes above quoted, it also appears from the record herein that, on the 28th day of October, 1904, the circuit court of Berrien county, Michigan, entered an order, authorizing the receivers to sue out a writ of error in this court to review the judgments of the Superior Court and of the Appellate Court of Illinois for the First District, in the case now sought to be reviewed, and authorized such receivers to sue out such writ in the name of such corporation. Pursuant to the authority conferred by the statutes of Michigan, as above quoted, and by the order so entered on October 28, 1904, the receivers have sued out the present writ of error in the name of the corporation. We are of the opinion that the suing out of the writ of error herein in the manner thus stated was proper, and that the receivers of plaintiff in error had the right so to proceed in the name of the corporation.

The plaintiff in error, the Eau Claire Canning Company, did not, by the decree of dissolution so entered by the Michigan circuit court, cease to be a corporation for all purposes, but merely ceased to be such for the purpose of continuing its corporate business. It still continued to exist for the purpose of collecting its assets, and winding up its business under the control of the receivers as aforesaid in place of the officers elected by the stockholders. By section 36 of the Michigan statute, as above quoted, new suits were authorized to be brought and carried on by the receivers in the name of the corporation; and by the order of October 28, 1904, the receivers were expressly authorized by the Michigan court to sue out the present writ of error from this court in the name of the corporation itself. The course of proceeding thus authorized by the Michigan statute and the Michigan court is in harmony with the statutes of Illinois, and with the decisions of this court.

In *Ramsey v. Peoria Marine and Fire Ins. Co.* 55 Ill. 311, the action was brought by a dissolved corporation, and the objection was made that the corporation had ceased to exist by reason of its dissolution by decree of the circuit court of Peoria county, but this court there held that, under the statute of this State extending the time for closing up the affairs of corporations where a corporation has been dissolved by a decree of court and a receiver has been appointed, a suit may be instituted and judgment recovered by the receiver in the name of the corporation after such dissolution upon debts due to the corporation; and that for such purpose the corporate capacity of the corporation is by the law continued for a period of two years after such dissolution.

In *Life Association of America v. Fassett*, 102 Ill. 315, an action of attachment had been brought against the Life Association, a Missouri corporation; pending the action and prior to the final judgment, defendant was dissolved by the St. Louis courts, and a receiver was appointed to wind up its affairs; and although the decree of the St. Louis court in terms declared the corporation dissolved, suits were authorized to be brought and defended in the name of the corporation for the purpose of winding up its business and paying its debts, etc., by other portions of the decree. In that case, the receiver appointed by the St. Louis court entered a special appearance in the Illinois suit for the purpose of filing written suggestions of the dissolution of the company under the proceedings in Missouri, and the court entered an order striking the suggestions from the files; thereafter the case was taken to this court by writ of error to the Appellate Court where the ruling of the trial court had been affirmed, and this court held that the corporation still existed for the purpose of collecting its debts and winding up its affairs, and affirmed the judgment of the Appellate Court. In the *Fassett* case, after referring to the statute of this State which contains a provision extending the existence of dissolved corporations for two years from the date of their dissolution

for the purpose of making a just and equitable distribution of their assets, we said (p. 324): "From these and other provisions of the statute it clearly appears that it is a part of the settled policy of the State, at least so far as domestic corporations are concerned, that upon their dissolution, however that may be effected, they shall nevertheless be regarded as still existing for the purpose of settling up their affairs and having their property applied for the payment of their just debts, and we see no sufficient reasons why the same policy should not, so far as practicable, be extended to foreign corporations that have property here, and are located among us for business purposes. * * * In addition to the reasons already given why we hold the company to be still existing for the purposes of enforcing the claim of defendant in error, it may be further stated, that, although the decree of the St. Louis circuit court, in terms, declares the corporation dissolved, yet by other portions of the decree, for the purpose of winding up the business of the company, paying its debts, etc., suits are authorized to be brought and defended in the name of the corporation, and it is also authorized for the same purpose, to make, in its corporate name, all necessary conveyances of its property and effects. It is thus clear, when all the provisions of the decree are considered together, as they should be, the corporation is not absolutely extinguished for all purposes, but, on the contrary, is expressly kept alive, so far as its existence may be necessary, to collect and apply its assets to the payment of its debts."

In *St. Louis and Sandoval Coal and Mining Co. v. Coal Mining Co.* 111 Ill. 32, one of the defenses pleaded was that the plaintiff corporation before the bringing of suit had been dissolved by decree of court, and it is there said (p. 39): "After a valid decree appointing a receiver for a private corporation, actions may be brought in its name, by leave of the court, against any one except the receiver, to try the legal title to property. It remains in being for the settling up of

its affairs and having its property applied in the payment of its debts. * * * The statute relating to private corporations continues their corporate existence for two years after their powers have expired, by limitation or otherwise, for the purpose of collecting their debts and disposing of their property." (See also *Stetson v. City Bank of New Orleans*, 2 Ohio St. 167; *Michigan State Bank v. Gardner*, 81 Mass. 362; *State v. Bank of Washington*, 18 Ark. 554; *Anglo-American Land Mortgage and Agency Co. v. Cheshire Provident Institution*, 124 Fed. Rep. 464; *Singer & Talcott Stone Co. v. Hutchinson*, *supra*; *Franklin Bank v. Cooper*, 36 Me. 179).

It is said, however, by counsel for the defendant in error that the statutes of Michigan, as above quoted, and the order of the Michigan court entered on October 28, 1904, can have no extra-territorial effect, nor any control of the method of procedure in the Supreme Court of Illinois. In support of this contention, certain language, used in *arguendo* in the case of *Life Association of America v. Fassett*, *supra*, is quoted. The present case, however, differs from the *Fassett case*, in that here there was not merely the decree or order of a court in a foreign State authorizing this suit to be begun, but there was an express provision of the statute of Michigan authorizing new suits to be brought and carried on by the receivers of a dissolved corporation in their own names or in the name of the corporation. This statute of Michigan is in harmony with the policy, which prevails in our own State in regard to the continuance in existence of dissolved corporations for the purpose of instituting such proceedings as are necessary to the winding up of their business. While comity between different States does not require a law of one State to be executed in another when it would be against the public policy of the latter State, it is nevertheless true that one State or nation will recognize and execute the laws of another through comity, when such execution is not against the public policy of the former State. (*Pope v. Hanke*, 155

Ill. 617). As has already been shown, there is nothing in the statutes of Michigan, as here quoted, which is against the public policy of Illinois. For the reasons above stated we are of the opinion that the motion to dismiss the writ of error should not be allowed, and, accordingly, the same is denied.

Second—As to the merits of the case at bar, it appears that the trial below was had before the court by agreement without a jury; that the defendant in error submitted no propositions to be held as law in the case, but that the plaintiff in error submitted nineteen propositions. Of the latter the court held eleven as law, to-wit: those numbered, 2, 3, 5, 6, 7, 9, 10, 14, 15, 16 and 18, but refused to hold as law eight of said propositions, numbered 1, 4, 8, 11, 12, 13, 17 and 19.

The complaint of the plaintiff in error is, that the trial court refused to hold as law the propositions, asked by the plaintiff in error, to the effect that the defendant in error could not recover upon the evidence in the case; and that the trial court refused to hold, as a proposition of law, that the "bought" and "sold" notes, delivered by W. S. Knight & Co. to defendant in error and to plaintiff in error, did not constitute a contract; and that the trial court admitted and considered certain testimony of the witnesses of the defendant in error, to the effect that sales upon the Chicago market were usually made upon "regular terms;" and that the trial court held that there was a sale here upon "regular terms," and with a guaranty of quality; and that plaintiff in error was bound by the note or memorandum sent to it by W. S. Knight & Co.

Leaving out of view for the present the papers or memoranda, denominated by plaintiff in error as the "bought" and "sold" notes, we think it apparent from the correspondence, set out in the statement of the facts preceding this opinion, and from the oral testimony introduced in connection with the correspondence, that W. S. Knight & Co. were the agents of plaintiff in error to sell its tomatoes for it upon the Chi-

cago market, and, as such agents, consummated a sale of the same to the defendant in error. The judgment of the trial court in favor of defendant in error, and the judgment of the Appellate Court affirming the same, are conclusive upon this court as to all questions of fact decided by the trial court; and we can only consider such evidence, so far as it is necessary to ascertain whether or not it tends to sustain the cause of action. Eagle, the president and representative of the agents or brokers, W. S. Knight & Co., swears that, in the spring of 1901, and before the 24th day of May, 1901, Reese, the secretary of plaintiff in error, called upon him, and requested that his firm, W. S. Knight & Co., should sell the goods of plaintiff in error for the latter, and that he, Eagle, agreed to do so. This testimony is confirmed by the language of the letters, which subsequently passed between the parties. In the letter of May 24, 1901, written by Reese, the secretary of plaintiff in error, to W. S. Knight & Co., reference is made to the call, theretofore made by Reese on W. S. Knight & Co. regarding "the canned goods arrangement, sales, etc." On May 25, 1901, Eagle, for W. S. Knight & Co., wrote a letter, referring to seventy-five cents per dozen as the price of tomatoes, and making use of the expression "regular terms." On June 13, 1901, Eagle for W. S. Knight & Co., again wrote plaintiff in error, proposing to sell its tomatoes "for future delivery if you will make price seventy-two and one-half cents regular terms delivered here, guaranteeing the quality strictly standard, goods to be shipped when packed." Without further reference to the language of the letters, it clearly appears that the only difference between Reese, representing plaintiff in error, and Eagle, representing W. S. Knight & Co., was as to the price of the tomatoes, Eagle suggesting that they could only be sold at the price of seventy-two and one-half cents per dozen, and Reese insisting that the plaintiff in error would not sell at less than seventy-five cents per dozen; but in none of the letters does Reese object to the terms of sale, suggested by Eagle, other

than the amount, or number of cents per dozen. No objection is made in any of the letters to a sale of the tomatoes upon "regular terms," nor is any objection made by Eagle, or the plaintiff in error, to a guaranty of the quality as being strictly standard. The whole correspondence shows that the sale was finally made at the price of seventy-five cents per dozen for the tomatoes, and upon "regular terms," and with a guaranty of the quality as standard.

In the letter of June 19, 1901, to W. S. Knight & Co., plaintiff in error stated that they had been offered seventy-five cents on 5000 cases of three pound tomatoes delivered and would make a concession in regard to freight. On June 20, 1901, Knight & Co. wrote to Reese, or plaintiff in error, saying: "We now have a proposition from an Iowa jobber who offers seventy-five cents less fifteen cents per hundred freight for 5000 cases. * * * Please let us know promptly whether or not you will accept this offer." On June 21, 1901, the plaintiff in error, through its secretary, Reese, wrote to Knight & Co. as follows in reply to the letter of June 20, 1901, to-wit: "Referring to yours of the 20th inst. Will state that if you can secure order for 5000 cases three pound tomatoes at seventy-five cents, we will allow fifteen cents per cwt. freight." Upon the receipt of this letter, Eagle, representing Knight & Co., closed a bargain with the defendant in error for the sale of the tomatoes upon the terms named in the letter of plaintiff in error written on June 21, 1901. It is true that, in the letter of June 21, 1901, plaintiff in error did not refer to a sale on "regular terms," nor to a guaranty of the quality as strictly standard, but the correspondence theretofore showed that the parties understood that the sale was to be made upon regular terms and with a guaranty of the quality as standard, provided the price should be seventy-five cents per dozen, instead of seventy-two and one-half cents per dozen. Independently, therefore, of any question as to a contract, formed by the exchange of "bought" and "sold" notes, W. S. Knight & Co., as authorized agents of

the plaintiff in error, made a sale of 5000 cases of canned tomatoes to defendant in error. What was subsequently done in reference to the exchange of "bought" and "sold" notes, or written memoranda, was merely for the purpose of carrying out and consummating a sale, which the authorized agents of plaintiff in error had made for it. The second count of the declaration alleged that such sale was made through W. S. Knight & Co., as the authorized agents and brokers of the plaintiff in error.

Third—If it be assumed that the contract between the parties must be based exclusively upon the "bought" and "sold" notes, alleged to have been exchanged, yet it cannot be said that such "bought" and "sold" notes did not constitute a valid contract between plaintiff in error and defendant in error. The contention of the plaintiff in error is that the bought and sold notes, delivered by W. S. Knight & Co. to the defendant in error and by the latter to plaintiff in error's agents, show that there was no meeting of the minds of the parties, and for that reason do not establish a contract. The plaintiff in error claims that W. S. Knight & Co., the brokers, were the agents of both the plaintiff in error and defendant in error for the purpose of executing bought and sold notes. The weight of authority is in favor of the position that, where such a broker, representing both parties, enters no memorandum of the sale in his book, or such book is not produced, the bought and sold notes together, if they agree, establish the contract between the parties, but, if they differ materially, they fail to establish a contract. (4 Am. & Eng. Ency. of Law,—2d ed.—pp. 753, 754). Where, however, the difference between the bought and sold notes is immaterial, it will not amount to such a variance as will defeat the contract. (Ibid.) But "a material variance may be explained by a usage of trade." (Ibid.)

"Bought" and "sold" notes have been defined to be "written memoranda of a sale of goods, delivered to the parties thereto by the broker employed to negotiate the sale."

(4 Am. & Eng. Ency. of Law,—2d ed.—p. 751). Generally, the memorandum delivered to the buyer is the bought note, and that delivered to the seller is the sold note, but some authorities hold that the sold note is delivered to the buyer and the bought note to the seller. (Ibid.; Story on Agency, sec. 28). The latter view was taken by this court in *Saladin v. Mitchell*, 45 Ill. 79, where the court, after defining a broker as “an agent employed to make bargains and contracts between other persons in matters of trade, for a compensation commonly called brokerage,” and as a mere negotiator between other parties, who never acts in his own name, but in the names of those who employ him, and, when he is employed to buy or sell goods, is not entrusted with the custody or possession of them, and is not authorized to buy or sell them in his own name, used the following language (p. 83): “He is a middle man, and, for some purposes, is treated as the agent of both parties. Where he is employed to buy and sell goods, it is the custom to give to the buyer a note of the sale, called a ‘sold note,’ and to the seller a like note, called a ‘bought note,’ in his own name, as agent of each, whereby they are respectively bound, if he has not exceeded his authority.” In *Saladin v. Mitchell*, *supra*, the bought note was signed by Saladin, the purchaser, and not by a broker or agent, and it certified that he, Saladin, had bought of Mr. Hall 5000 bushels of barley as per sample, etc. The sold note, however, was signed by Hall, the broker, who was authorized to sell the barley for the owner thereof and certified that there had been “sold to Saladin, 5000 bushels Canada barley.” In the case at bar, the sold note, or sale ticket, which was given by Eagle of the firm of W. S. Knight & Co., as the representative of plaintiff in error, to Smith, the representative of the defendant in error, was signed by W. S. Knight & Co., the brokers, but the memorandum, or bought note, which was delivered by Smith for defendant in error to Eagle, the agent of plaintiff in error, was signed by the Western Brokerage Company itself through Dudley Smith.

The present case is thus similar to the case of *Saladin v. Mitchell, supra*, in that one of the notes or tickets, exchanged between the parties, was signed by one of the parties, and not by any agent, while the other note was signed by the agents of plaintiff in error, the seller of the tomatoes. The sale ticket, enclosed by W. S. Knight & Co. to the plaintiff in error in their letter of June 24, 1901, was merely an unsigned memorandum, in which W. S. Knight & Co. stated, or attempted to state, the terms of the sale theretofore made by them to the defendant in error. The memorandum, so enclosed by Knight & Co. in their letter of June 24, 1901, was not one of the bought and sold notes, or sale tickets, exchanged between the parties, but was merely a statement by Knight & Co., giving their own interpretation of what the contract was. The contract had already been made and completed by the exchange of the two documents, dated June 24, 1901, one of which was signed by "W. S. Knight & Co.," and the other of which was signed by "Western Brokerage Co., per Dudley Smith."

It is claimed on behalf of plaintiff in error that the sale ticket given by Eagle to Smith, dated June 24, 1901, and signed by W. S. Knight & Co., as set forth in the statement preceding this opinion, differs materially from the memorandum of the same date, delivered by Smith to Eagle, and signed by "Western Brokerage Co., per Dudley Smith." There is said to be a material variance between these two instruments, which are called the bought and sold notes. Something is also said to the effect that there is also a variance between each of these instruments and the unsigned memorandum, sent by W. S. Knight & Co. to the plaintiff in error in the letter written by W. S. Knight & Co. to the plaintiff in error on June 24, 1901. As the latter memorandum was a mere unsigned report, made by W. S. Knight & Co., it cannot be regarded as one of the sale tickets actually exchanged between the parties, and, therefore, if a material variance existed to such an extent that the minds of the par-

ties did not meet, it must be a variance between the instrument, dated June 24, 1901, signed by W. S. Knight & Co. and the instrument of the same date, signed by the Western Brokerage Company, per Dudley Smith.

The variance between the instrument, signed by W. S. Knight & Co., which we will call the sale ticket, and the instrument signed by Western Brokerage Company, per Dudley Smith, which we will call the bought ticket, is said to consist in this, that the sale ticket contained no guaranty of swells or quality, while the bought ticket contained the "usual guarantee against swells and quality." The latter also contained the words, "terms regular," which the former did not contain. Both of them, as we understand them, contained the words, "5000 cases of standard No. 3 tomatoes," or "three pound tomatoes." The rule that, where there is a variance between the bought and sold notes, no contract is established, refers to a variance which is material. In view of the evidence in this case it cannot be said that there is any material variance between the ticket, signed by W. S. Knight & Co. and that signed by Western Brokerage Company.

Fourth—Where a person deals in a particular market, he must be taken to deal according to the known general and uniform customs or usages of that market. Where a principal employs an agent to act for him in a particular market, he must be taken as intending that the business to be done will be done according to the usage and custom of that market whether the principal ever knew of the usage or custom or not. (*Bailey v. Bensley*, 87 Ill. 556). The correspondence, however, shows that plaintiff in error intended to sell upon the Chicago market under its custom, and, as is well said by the Appellate Court: "The evidence fully warranted the trial judge in holding that Reese, the secretary and business manager of the appellant, knew of that custom prior to June 20, 1901, and assented to the same." In *Loneragan v. Stewart*, 55 Ill. 44, we said: "Although it is true, usages of trade cannot be set up either to contravene an established

rule of law, or to vary the terms of an express contract, yet all contracts made in the ordinary course of business, without particular stipulations, expressed or implied, are presumed to be made in reference to any existing usage or custom relating to such trade, and it is always competent for a party to resort to such usage to ascertain and fix the terms of the contract." (See also *Burton v. Goodspeed*, 69 Ill. 237; *Payne v. Potter*, 9 Iowa, 552).

The testimony in this case shows that the words, "regular terms," have a definite meaning, which is that the buyer has a credit of sixty days with the privilege of a one and one-half per cent discount in case cash is paid within ten days from date of invoice, and also that there is a six months' guaranty on swells. Swells refer to defective cans, in which the tomatoes may be packed. The defect sometimes is in the can itself, and sometimes in the manner in which the tomatoes are packed. The words, "usual guarantee against swells and quality," as used in the memorandum signed by Western Brokerage Company, although not written in so many words in the sale ticket signed by W. S. Knight & Co., are yet a part of the latter ticket by implication, in view of the usages and customs of the market, in which the parties were transacting their business. Reese, the secretary of plaintiff in error, says in his evidence: "I do not presume I sold on any other than 'regular terms' in the Chicago market. I think all of the pack of our factory for the year 1901 was sold upon the terms of sixty days from the date of invoice, with one and one-half per cent discount in case of cash in ten days." The words "cash, less one and one-half per cent," have no other or different meaning than the words, "terms regular, less one and one-half per cent, cash ten days," as used in the memorandum signed by Western Brokerage Company. The phrase, "cash, less one and one-half per cent," is elliptical, and requires expansion to fully express the meaning intended. "In the language of the commercial world, sales where it is intended that the purchaser is to have

a short credit, as, for example, ten days, or even thirty days, are often termed cash sales, while the strict legal significance of a cash sale is undoubtedly one where delivery and payment are to be concurrent acts and be performed at the same instant of time." (*Anglo-American Provision Co. v. Prentiss*, 157 Ill. 506). The evidence tends to show that the usage of the Chicago market was invariably to guarantee quality, and against swells. The ticket signed by W. S. Knight & Co. provided for the sale of 5000 cases of standard No. 3 tomatoes, that is to say, tomatoes of standard quality. The witness, Tilghman, says: "When we guarantee quality, we mean a can full of tomatoes in the first place; in the second place, they shall be ripe fruit; that is a standard can; that is a recognized standard can in all markets of the country." Therefore, when the ticket signed by Western Brokerage Company provided for the usual guaranty of quality, it did nothing more than provide for the standard quality, expressed by the word "standard" as used in the ticket signed by W. S. Knight & Co. The usages of trade, taken in connection with the reference in the correspondence to "regular terms" and the guaranty of quality, authorized Knight & Co. to make the usual and customary guarantees, which accompanied sales in the Chicago market. The witness, Nichols, says: "When I speak of guaranteeing swells for the season, I mean for the season following delivery of goods; that would be six months from the date of shipment or date of invoice." Some of the testimony tends to show that a season's guaranty is for twelve months, while other portions of the testimony tend to show that such guaranty is for six months only. As, according to the usages and customs of the Chicago market, as proven in the testimony, all sales were made upon "regular terms," and with the usual guaranty against swells, and upon sixty days' credit, or one and one-half per cent discount in case of cash in ten days, the law imports these words into the ticket, signed by W. S. Knight & Co., and, therefore, it cannot be said that there is

any material variance between the two tickets or notes. As is well said by the trial court: "In this view of the case, it cannot be said there is any material difference between the sales ticket and the memorandum sent the defendant, because season's guaranty on swells on memorandum, and not on the sale ticket, is embraced according to usage in 'regular terms,' upon which the sale was made, as per letter of June 13, 1901, and the reply of defendant to it. The law read the words upon the sale ticket. They were not there in words, but implied."

Fifth—In addition to what has been said, the two tickets, or bought and sold notes, the one signed by W. S. Knight & Co. and the other signed by Western Brokerage Company, were both executed at the same time, and as parts of the same transaction. "They are to be treated precisely as though both had been actually embodied in the same document, and in construing them, force is to be given, if possible, to the language of both." (*Anglo-American Provision Co. v. Prentiss, supra*). In *Gardt v. Brown*, 113 Ill. 475, it is held: "Where two written instruments are executed as the evidence of one transaction, they will be read and construed together as one instrument, in arriving at the intention of the parties." In *Wilson v. Roots*, 119 Ill. 379, it is held: "Where different instruments are executed as the evidence of one transaction or agreement, they are to be read and construed as constituting but a single instrument. Although it is not competent to contradict or enlarge the terms of a written agreement by parol evidence, it is competent to resort to such evidence to ascertain the nature and qualities of the subject to which the instrument refers. Courts, in construing written contracts, endeavor in all cases to place themselves in the position of the contracting parties, so that they may understand the language, and in the sense intended by the persons using it." (See also *Keith v. Miller*, 174 Ill. 64).

The two memoranda here under consideration do not contradict each other. The provisions contained in one are

not repugnant to any of the provisions contained in the other. If they be construed together with like force and effect as if embodied in the same document, each contains all the material provisions appearing in the other, and together they establish the agreement made between Smith and Eagle. The report of sale, communicated by Knight & Co. to the canning company in the letter of June 24, 1901, is merely a synopsis of the contract actually effected, and contains all the material provisions appearing in either of the two memoranda. The terms and conditions embodied therein correctly summarize the terms and conditions actually agreed upon between the parties, as evidenced by the respective memoranda exchanged between them.

In *Saladin v. Mitchell*, *supra*, the court had no difficulty in deciding that the bought and sold notes, involved in that case, constituted a contract between the parties, and yet there was a greater variance between the two notes in that case than between the notes in the case at bar. The bought note, signed by Saladin, stated that he had bought of Mr. Hall 5000 bushels of barley, while the sold note signed by Hall, the agent, stated that there had been sold to Saladin 5000 bushels of *Canada* barley. The one note also spoke of the purchase of 5000 bushels of barley as "per sample," while the note signed by Hall spoke of a sale to Saladin of 5000 bushels of *Canada* barley without the use of the words, "as per sample." The one note also referred to storage at two or two and one-half cents, while the other referred to storage at two cents only. Again in *Murray v. Doud & Co.* 167 Ill. 368, the bought note provided for "goods to be *in prime condition* on arrival in Chicago," while the sold note provided for "goods to be *in prime condition for butterine purposes* on arrival in Chicago." Here was a variance between the two notes, inasmuch as the latter used the words "for butterine purposes," while the other omitted these words, and yet this court says, referring to the testimony of the broker, L. M. Prentiss (p. 372): "It further appears

from his testimony that upon making the sale the 'bought and sold notes' were made out and delivered to the respective parties. The law is well settled that 'bought and sold notes' executed by a broker, like those in question, are competent evidence to establish a contract. Here, Prentiss was a broker. He was empowered to sell the leaf lard that plaintiffs should produce during a specified period. He made the sale as he was authorized to do, and executed the 'bought and sold notes' as evidence of the transaction. Notes of this character have been fully sustained by this and other courts."

Sixth—Again, the conduct of plaintiff in error amounts to a ratification of the contract, evidenced by the "bought and sold notes" exchanged between defendant in error and W. S. Knight & Co., the agents of plaintiff in error. On June 24, 1901, Knight & Co. sent by mail to the plaintiff in error the unsigned sale ticket or memorandum already referred to, which summarized and gave a synopsis of the terms and conditions of the contract previously entered into. This sale ticket was retained by the plaintiff in error for about four months without any repudiation of the contract therein described. "Ratification is equivalent to previous authority. It operates upon the act ratified in the same manner as though the authority had been originally given." "Ratification relates back to the beginning of the thing ratified and renders it obligatory from the outset." (23 Am. & Eng. Ency. of Law,—2d ed.—p. 890, and cases in notes). In the case at bar, the ratification by the plaintiff in error of the ticket, forwarded by W. S. Knight & Co., is equivalent to specific authority previously given to effect a sale, with the guaranty concerning swells, set forth on said ticket as aforesaid. Where a principal, upon being informed of an unauthorized act of another in his behalf, does not give notice of his non-concurrence within a reasonable time, he is held to assume the responsibility for the act thus reported. Inasmuch as the plaintiff in error received a report of sale from W. S. Knight & Co. on June 24, 1901, and failed to repudiate their

act therein described, it will be held in law to have ratified and approved each and all of the terms of sale described in such report. It was the duty of the plaintiff in error to notify Knight & Co., or the defendant in error, within a reasonable time, of its refusal to be bound by the sale as reported, if it did not intend to accept the same; but it gave no such notification. In *Barbour v. Mortgage Co.* 102 Ill. 121, this court said (p. 128): "He, (the appellant,) had no right to lie by in silence, and wait until third parties had advanced large amounts of money upon the faith of what his agent had done, and then undertake to repudiate the act as unauthorized. Honesty and fair dealing required Barbour to act at once upon receiving information of the unauthorized act of his agent." The silence of the plaintiff in error, under the circumstances, was an acquiescence in, and a ratification of, the acts of Knight & Co., its agents. "In all the varied business transactions of men, wherever the relation of principal and agent exists, it is the duty of the principal to repudiate the unauthorized act of his agent as soon as he reasonably can after it has come to his knowledge, or he will be held to have ratified it." (*McGeoch v. Hooker*, 11 Ill. App. 649).

Here, plaintiff in error not only did not repudiate the contract, or give any intimation that it did not approve of the act of its agents in making it, but it impliedly endorsed the contract by some of the language used in the letters written by it. For example, in the letter written by plaintiff in error to W. S. Knight & Co. on June 26, 1901, refusing an offer of said firm to sell 5000 cases of tomatoes in addition to those sold to the defendant in error, plaintiff in error said: "We will not be able to secure more than one-half that amount, and we do not feel like contracting any *farther futures* less than seventy-five cents straight." By the use of the words, "*farther futures*," the plaintiff in error evidently referred to its inability to make any farther or other sales than the sale already made to defendant in error, thereby recognizing the latter sale as having been made.

As to the amount of the judgment in this case, no objection is made by the plaintiff in error. It is conceded by both parties that, if the defendant in error is entitled to recover at all, the amount of the judgment rendered by the trial court is correct.

For the reasons above stated, we are of the opinion that the contract of sale, as set forth in the declaration, was actually made, and that the finding of the trial court, and the judgment entered upon that finding, are correct.

Accordingly, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

A. B. McCLESNEY *et al.*

v.

THE CITY OF CHICAGO.

Opinion filed February 21, 1905.

1. SPECIAL ASSESSMENTS—*assessment cannot draw interest unless payable in installments.* A special assessment not divided into installments but to be paid in one payment cannot be made to draw interest, since there is no statutory provision to that effect.

2. SAME—*when description in an ordinance is insufficient.* Describing the water supply-pipes, fire hydrants, crosses and tees to be used in a proposed improvement as "city of Chicago standard," is not, of itself, a sufficient compliance with the statute requiring the ordinance to describe the improvement.

3. SAME—*when street railway right of way is not liable to assessment.* The contract evidenced by an ordinance granting the right of way to a street railway company, whereby the company agreed, when any new improvement to the street should be ordered, to make such improvement for the width of eight feet for single tracks and sixteen feet for double tracks, applies only to surface improvements of the street, and not to the laying of water pipes.

APPEAL from the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

F. W. BECKER, for appellants.

ROBERT REDFIELD, and FRANK JOHNSTON, Jr., (EDGAR B. TOLMAN, Corporation Counsel, of counsel,) for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The county court of Cook county confirmed the special assessment against the property of the appellants to pay for laying a water supply-pipe in Coles avenue, in the city of Chicago, and this appeal followed.

The assessment was not divided into installments but was to be paid in one payment, and the ordinance provided that it should bear interest "at the rate of five per cent per annum according to law until paid." Section 42 of the Local Improvement act, as amended in 1903, permits a city council to divide a special assessment into installments, not more than ten, the first installment to be due and payable on the second day of January after the date of the first voucher issued on account of work done, the other installments to mature annually thereafter, and all installments to bear interest at the rate of five per cent per annum from the date of the first voucher. (Laws of 1903, p. 103.) That section applies only to assessments which are divided into installments, and an assessment payable in a single payment can not be regarded as an installment of an assessment or within the language of the statute. There is no other provision that an assessment shall draw interest, and in the absence of statutory authority the city council had no right to require the payment of interest, which is never allowed unless given by statute. Counsel for the city say that the provision for interest may be eliminated without affecting the remainder of the ordinance, and therefore the ordinance is not void on account of that provision. Whether that would be so if the ordinance were otherwise valid will not be considered, for the reason that there are other defects in the ordinance.

The improvement is described in the ordinance, among other things, as a cast-iron supply-pipe of the city of Chicago standard, of a certain internal diameter and weight; two city of Chicago standard fire hydrants connected with the supply-pipe with iron pipe of the city of Chicago standard; one six-inch city of Chicago valve; a cross of the city of Chicago standard and a tee of the city of Chicago standard to be placed in the water supply-pipe. We decided in the case of *Washburn v. City of Chicago*, 202 Ill. 210, that such a description, where the ordinance does not fix any standard or make any reference to any existing thing, is on the face of the ordinance unintelligible and not in compliance with the statute. The requirement that the ordinance shall contain a description of the improvement means that it shall set forth and represent by its language what the contemplated improvement will be. The language must be such as will make known to the owners of property to be assessed, and to contractors and the court, what kind of improvement is contemplated, and if that cannot be determined from the language used there is no sufficient description, unless it is made intelligible by proof. Where, as in this case, there is no evidence as to the meaning of terms, the question must be decided from the words of the ordinance themselves. The ordinance includes, as a material part of the description, some supposed standard, which may be a test of kind, quantity, quality, value or something else, and whether established by the city or contractors or by what authority is unknown. It is not like a description by reference to a specific object or thing, as was the case in *Lanphere v. City of Chicago*, 212 Ill. 440, where the ordinance described the iron covers of catch-basins of a certain weight as being of the same size and pattern as those used in new work by the city of Chicago during the year 1902. A description by reference to a definite object or thing is, on the face of it, definite. There is no doubt or uncertainty in the description of property by reference to a stone or other fixed monument, and if

any uncertainty exists it only becomes manifest upon proof. If a pipe or hydrant is to be exactly like another pipe or hydrant pointed out in the ordinance in the vicinity where the improvement is to be made, the description is sufficiently definite. On the face of this ordinance there is no sufficient description of the improvement.

It is also objected that the right of way of the South Chicago City Railway Company should have been assessed. The ordinance granting the right of way to that company provided that it should pave and keep in good condition and repair all streets in which its tracks should be laid, eight feet in width where there was a single track and sixteen feet where there were double tracks, and when any new improvements to said streets or parts of streets should be ordered by the city council, the company should, in the manner required of property owners, make such improvements for the width of eight feet where a single track should be laid and sixteen feet where double tracks should be laid. A proceeding for the purpose of improving a street may include other than surface improvements, (*Town of Cicero v. Green*, 211 Ill. 241,) but in this case the contract clearly relates only to surface improvements for the width of eight feet where there is a single track and sixteen feet where there are double tracks. The obligation assumed does not include a water supply-pipe laid under the surface, and in this case it is to be laid on one side and apparently not within the width limited by the ordinance granting the right of way.

Another objection is that a certain lot was not assessed. The evidence was that it would not be benefited. It had a frontage of two hundred and eighteen feet on another street and was already furnished with a water supply, while the depth on Coles avenue was such that there would be no benefit.

For the errors indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

DAVID LUTHER

v.

SARAH L. CRAWFORD *et al.**Opinion filed February 21, 1905.*

APPEALS AND ERRORS—*when the Supreme Court must affirm.* A judgment of the Appellate Court affirming a judgment disallowing a claim against an estate must be affirmed by the Supreme Court where none of the questions of law discussed by counsel are preserved for review, there being no rulings in the record upon them.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. FRANK BAKER, Judge, presiding.

HARRY A. REHERD, for appellant.

FRANK P. GRAVES, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellant filed in the probate court of Cook county a claim against the estate of Andrew Crawford, deceased, of which appellees are executors, based on the following instrument:

"May 17th, 1865.

"Deposited with me by David Luther eight hundred dollars in cash and three hundred dollars in Yorktown bonds, to be delivered on call.

A. CRAWFORD."

After a hearing the claim was allowed at \$1160. Appellees appealed to the circuit court, where the case was tried by the court without a jury. The instrument was in evidence, with proof of its execution, and the following facts were also proved: In 1865 Andrew Crawford was the president of a bank at Geneseo, Illinois, and was an attorney and money lender. Appellant has resided in Geneseo over forty years and has been engaged in real estate operations and

loaning money. The Yorktown bonds mentioned in the instrument were part of an issue of bonds of the township of Yorktown, in Henry county, drawing interest at ten per cent, which were paid in full by the town, the last of them in 1871. Crawford continued to reside in Geneseo up to 1873, when he removed to Chicago, where he resided until his death, in 1900. At all times after the instrument was executed Crawford was a wealthy man, able to meet all his obligations, and he was worth over \$1,000,000 at the time of his death. The circuit court disallowed the claim and rendered judgment against appellant for costs. He appealed to the Appellate Court for the First District, where the judgment was affirmed, and from the judgment of the Appellate Court he appealed to this court.

Counsel for appellant does not complain of any ruling of the circuit court in the course of the trial, and there are no propositions of law, either held or refused, in the bill of exceptions. The complaint is that the judgment of the circuit court was wrong for the reason that the certificate of deposit created a trust relation, and an action upon it was not barred by any statute of limitations or the lapse of any period of time until a demand should be made. On the other side, it is insisted that the certificate is a promissory note barred by the Statute of Limitations, and that, independently of any statute of limitations, the law raises a presumption that a debt which has been due and without recognition or payment of interest for twenty years has been paid, casting the burden of proof on the creditor to overcome the presumption. The judgment of the Appellate Court is conclusive as to the facts, and there is no ruling in the record on the questions of law discussed by the counsel. What the court held or refused to hold as the law upon those questions does not appear from the bill of exceptions, and we are therefore unable to review the judgment of the court on any question of law.

The judgment is affirmed.

Judgment affirmed.

CAROLINE LANG

v.

MATTHEW FRIESENECKER.

Opinion filed February 21, 1905.

1. CONSTITUTIONAL LAW—*amendment of 1895 of section 9 of the act relating to lunatics, drunkards, etc., is not unconstitutional.* The amendment of 1895 to section 9 of the act relating to lunatics, drunkards, idiots and spendthrifts, (Laws of 1895, p. 244,) which authorizes a conservator, upon the death of his ward, to make final settlement of the estate without further letters of administration, is not unconstitutional, as embracing a subject not expressed in the title of the act.

2. STATUTES—*when subsequent act repeals or creates an exception to former act.* Where a special act is repugnant to or inconsistent with a former general one, a *pro tanto* repeal of the former will be implied or an exception will be regarded as engrafted upon the earlier act by the later one.

3. EXECUTORS AND ADMINISTRATORS—*conservator may administer estate as against next of kin.* The amendment of 1895 to section 9 of the act relating to lunatics, drunkards, idiots and spendthrifts, which authorizes a conservator to administer the estate of his deceased ward, creates an exception to sections 1 and 18 of the Administration act, providing for the issue of letters of administration to the next of kin of deceased or some one appointed by them.

4. SAME—*when estate is regarded as intestate as respects appointment of personal representative.* If a person named as executor in a will is dead when the will is offered for probate, the estate must be regarded, under section 1 of the Administration act, as intestate, so far as the appointment of a personal representative is concerned.

APPEAL from the County Court of JoDaviess county; the Hon. WILLIAM RIPPIN, Judge, presiding.

This is an appeal from an order of the county court of JoDaviess county, entered on September 3, 1904, dismissing the petition of the appellant, Caroline Lang, and one Grant M. Heiserman, for the granting of letters of administration with the will annexed to M. H. Cleary on the estate of Wil-

helmina Kettler, deceased, and ordering that the said Matthew Friesenecker proceed with the administration of said estate, as by law empowered.

Wilhelmina Kettler, who had been insane for several years, died testate on May 2, 1904, leaving a will, in which she appointed Louis A. Rowley executor. Rowley, the executor, had been dead for several years when this proceeding was instituted. Wilhelmina Kettler, deceased, left surviving her neither husband, nor children, nor descendants of children, but left surviving her, as next of kin and heirs-at-law, Caroline Lang, the appellant, her sister, Gottlieb Heiserman, a brother, and John F. Heiserman, Louis J. Heiserman, and Grant M. Heiserman, nephews, being the children of a deceased brother, named John Jacob Heiserman. The will of Wilhelmina Kettler was executed on February 23, 1895, more than nine years before her death. By its terms she left all her estate, real, personal, or mixed, and of every nature and kind, share and share alike to her sister, the appellant, Caroline Lang, of Montana, and her brother, Jacob Heiserman, of St. Louis, Missouri. She left personal estate, consisting chiefly of moneys, notes, credits and securities, being estimated to be worth about \$20,000.00. The will of the deceased testatrix was admitted to probate according to law.

The appellee, Friesenecker, was on August 30, 1897, appointed conservator of Wilhelmina Kettler, insane, by order of said county court.

On June 20, 1904, Caroline Lang by George L. Blum, her attorney in fact, and Grant M. Heiserman above named, being the sister and nephew of the deceased, by M. H. Cleary, their attorney, presented to the county court their petition, praying that letters of administration with the will annexed upon the estate of the deceased Wilhelmina Kettler might be issued to M. H. Cleary. The appellee, Friesenecker, by his attorneys, entered his appearance, and objected to the granting of letters as prayed for in said petition, and claimed the right as such conservator to settle up the estate in question,

as provided by section 9 of chapter 86 of the statutes of Illinois. A power of attorney, executed by Caroline Lang to George L. Blum, dated May 31, 1904, was presented to the court, and it is conceded that such power of attorney authorized the said Blum to file the petition for the appellant, and to take such steps as might be necessary in the administration of the estate. Wilhelmina Kettler was insane at the time of her death.

M. H. CLEARY, for appellant.

JONES & KERZ, and SHEEAN & SHEEAN, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The question in this case is, whether the appellant, Caroline Lang, as next of kin to Wilhelmina Kettler, deceased, had a right to nominate M. H. Cleary to be administrator with the will annexed of the estate of the deceased under section 18 of the Administration act, or whether the appellee, Friesenecker, having been duly appointed conservator of the estate of Mrs. Kettler and acting as such at the time of her death, had a right to administer on such estate. The court denied the prayer of the petition of the appellant to grant letters of administration to Cleary, and dismissed the same, and directed the appellee, Friesenecker, as conservator, to settle up the estate, and to that end exercise all the powers of administrator.

Section 1 of the act in regard to the administration of estates, provides "that when a will has been duly proved and allowed, the county court shall issue letters testamentary thereon to the executor named in such will, if he is legally competent and accepts the trust, and gives bonds to discharge the same; and when * * * the executor named therein dies, * * * the court shall commit the administration of the estate unto the widow, surviving husband, next of kin,

or creditor, the same as if the testate had died intestate." (1 Starr & Cur. Ann. Stat.—2d ed.—p. 269). In the case at bar, Rowley, the executor named in Mrs. Kettler's will, had died, and, under the provisions of section 1 of the Administration act as above quoted, the estate is to be regarded as intestate, so far as the selection of the administrator thereof is concerned.

Section 9 of chapter 86 of the Revised Statutes, being "An act to revise the law in relation to idiots, lunatics, drunkards and spendthrifts," approved March 26, 1874, provided as follows: "Such conservator shall at the expiration of his trust, pay and deliver to those entitled thereto all the money, estate and title papers in his hands as conservator, or with which he is chargeable as such, in such manner as shall be directed by the order or decree of any court having jurisdiction thereof." (2 Starr & Curt. Ann. Stat.—2d ed.—p. 2665). By act of June 7, 1895, entitled "An act to amend section 9 of chapter 86 of an act entitled 'An act to revise the law in relation to idiots, lunatics, drunkards and spendthrifts,' approved March 26, 1874, in force July 1, 1874," said section 9 was amended by adding thereto the following: "Whenever any lunatic, idiot, drunkard or spendthrift shall die, seized or possessed of any real or personal estate, then such conservator shall have full power and authority under the letters issued to him or her to make final settlement and distribution of the estate of said deceased ward without further letters of administration, in such time and manner as is required by law of administrators of the estate of deceased persons: *Provided*, this shall not apply to non-resident conservators." (Sess. Laws of Ill. of 1895, p. 244). The object of this amendment was evidently to save the expense of administering upon the estates of deceased insane persons, whose estates were already under the control of conservators and undergoing settlement by the latter. The amendatory act set forth the whole of section 9, including the same as it was under the act of 1874 and the amendment thereto passed in

1895. Section 9 now appears in the Revised Statutes as containing the provision of 1874, and also the provision of 1895. (*Vide* 2 Starr & Curt. Ann. Stat.—2d ed.—p. 2665).

First—It is first contended on the part of the appellant that the amendment of said section 9, as passed in 1895, is unconstitutional. The provision of the constitution, which it is said to contravene, is that part of section 13 of article 4 of the constitution of 1870, which reads as follows: "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title." (1 Starr & Curt. Ann. Stat.—2d ed.—p. 125).

The position of counsel for appellant is, that section 9, as passed in 1874, simply required the conservator to pay and deliver over to those entitled thereto all money, estate and title papers in his hands as conservator, or with which he was chargeable as such, in such manner as should be directed by order or decree of court at the expiration of his trust. The section, as it thus originally stood in 1874, does not designate when the trust of the conservator shall terminate, but other sections of chapter 86 refer to the determination of the trust by removal, resignation or death. It is said that, inasmuch as the original section was confined to a simple direction to the conservator to turn over the property in his possession as the court should direct, the subject matter of the amendment to the section cannot be regarded as germane to the duty of so turning over the property in his possession, as directed by the section before it was amended. Therefore, it is insisted that the amendment specifies other matter than that which is contained in the title. In other words, the original section is said to confer upon the conservator the sole duty of turning over the property in his possession, while the amendment confers on the conservator the powers and duties of administration in addition to such duty. The power to make final settlement and distribution of the estate of the deceased ward without further letters of administration in such time and manner as is required by law of the adminis-

trators of the estates of deceased persons, as conferred by the amendment, is said to be not germane to the duty conferred by the original section, and, therefore, not to be embraced within the title of the act, which is "An act to amend section 9 of chapter 86 of an act entitled 'An act to revise the law in relation to idiots, lunatics, drunkards and spendthrifts,' approved March 26, 1874," etc. In support of the contention of the appellant the case of *Dolese v. Pierce*, 124 Ill. 140, is referred to. In that case, the amendatory act under consideration was an act entitled "An act to amend sections 2, 4, 6, 7, 10, 11 and 12 of article 3, of an act entitled 'An act to revise the law in relation to township organization,' approved and in force March 4, 1874." The act, after providing that the county board of each county should have full power and jurisdiction to unite two or more contiguous towns into one, added a proviso that "where said town, to which such territory is annexed, is wholly within the limits of an incorporated city, the limits of said city shall thereupon be extended to include the territory annexed to such town." In that case the amendatory act was held to be in violation of section 13 of article 4 of the State constitution because, in attempting to amend an act to revise the law in relation to townships, it sought to change the boundaries of cities and incorporated villages, and, therefore, embraced more than one subject. The decision of the court there was that the amendatory act assumed to provide for a change in the boundaries of cities and villages, and, as that subject was not embraced in the title of the act, it was in violation of section 13 of article 4 of the constitution. It was there said that townships on the one side and cities and villages on the other were in law and fact as distinct from one another as any two artificial beings could be.

The case of *Dolese v. Pierce*, *supra*, has, however, no application to the case at bar. We see no reason why the matter, contained in the amendment of 1895 to section 9 of chapter 86, cannot be regarded as germane to the subject

matter contained in the original section 9 as it stood in 1874. The amendment merely provided that, where the insane person should die, the conservator should proceed to make final settlement of his estate without further letters of administration, and in such manner as was required by law of administrators. The original section stated what the conservator was to do at the expiration of his trust, and the amendment simply provided that, at the death of the ward, that trust should continue, until the ward's estate should be settled in the same way, in which the estates of other deceased persons are settled, and without new letters of administration. The amendment had relation to the duties of the conservator just as the original part of the section had relation to such duties. In *Dolese v. Pierce, supra*, it was said (p. 146): "It is clear that the scope of the act of 1887 is limited by the subject matter contained in the amended sections before amendment, for to introduce any new substantive matter not germane or pertinent to that contained in the original sections, could, in no proper sense, be regarded as an amendment of them, but would manifestly be additional, independent legislation upon a matter not embraced in the title of the act, and consequently void. The amendment of an act in general, or of a particular section of an act, *ex vi termini*, implies merely a change of its provisions upon the same subject, to which the act or section relates." As the title of the act of 1874 is included in and constitutes a part of the title of the amendatory act of 1895, it follows that both acts relate to the same general subject of "idiots, lunatics, drunkards and spendthrifts." The amendatory provision tends to promote the object and purpose of the original section 9 and of the act to which it belongs. Such amendment introduces no new subject matter into the act, and is not obnoxious to the constitutional provision in question. The provision of the constitution, requiring acts of the legislature to embrace in their titles but one subject which shall be expressed in the title, is complied with where the general object of an act has been expressed.

"The general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act relating to that alone, would not only be unreasonable, but would actually render legislation impossible." (*Arms v. Ayer*, 192 Ill. 601). In *Arms v. Ayer*, *supra*, where the title of an act was "An act relating to fire escapes for buildings," it was held that such title was sufficient to cover provisions, which imposed duties upon inspectors of factories, upon the grand jury, upon the sheriff, and upon the circuit courts and criminal courts, and also provisions prescribing a penalty for violating the act.

In *Morrison v. People*, 196 Ill. 454, this court said (p. 461): "The act in question [Civil Service act], was passed in the form of an amendment to section 61 of an act entitled, 'An act to revise the law in relation to counties.' * * * The amendment fairly falls within the subject matter of the original act and is germane to the general subject expressed in its title, which is all that is required by the constitutional provision above quoted." (See also *Meul v. People*, 198 Ill. 258). In *People v. Blue Mountain Joe*, 129 Ill. 370, this court said (p. 376): "It has been uniformly held by this court that, if the subject of the act be expressed in the title in general terms, it will be sufficient, under the provision of the constitution quoted. * * * The general purpose of this provision of the constitution is accomplished when the title is comprehensive enough to reasonably include as falling within that general subject, and as subordinate branches thereof, the several objects which the statute assumes to effect. * * * If, therefore, the subject matter of the section under consideration is germane to the general subject expressed in the title, or forms a subordinate branch or part of such general subject, it must be held as embraced within the title of the act." We are unable to see why a provision, which gives the conservator power to administer

upon, and settle up, the estate of his deceased ward who is an idiot, a lunatic, drunkard or spendthrift, is not germane to the general subject of the law in relation to idiots, lunatics, drunkards and spendthrifts. Even if the amendment to said section 9 should be held to have the effect of amending the Administration act, it is yet true that a statute need not express in its title the fact, that it impliedly amends another statute, or even repeals another statute. (*Timm v. Harrison*, 109 Ill. 593). In other words, section 13 of article 4 of the constitution, providing that no act shall embrace more than one subject, which shall be expressed in its title, does not require a repeal by implication of another statute to be so expressed. (*Geisen v. Heiderich*, 104 Ill. 537).

For the reasons above stated, we are of the opinion that the amendment to section 9 of chapter 86 is not unconstitutional.

Second—Counsel for the appellant contends, in the second place, that even if the amendment in question is held to be constitutional, it cannot be regarded as repealing sections 1 and 18 of the Administration act, and that, as these sections give to the next of kin the right to nominate the administrator of the estate, where the executor named in the will is dead, the prayer of appellant's petition to nominate the administrator of the estate here in controversy should have been granted.

It is true, that section 18 authorizes the court to grant letters of administration to some competent person, who may be nominated to the court by the next of kin. The provision of the amendment to section 9 provides that, where a ward, who is insane, etc., dies, and there is a conservator of his estate at the time of his death, such conservator may proceed to make final settlement of the estate without taking out letters of administration, in the same way as the ordinary administrator of any estate might do. It must be admitted that this amendment to section 9 does create an exception to the general provision in section 18 of the Administration act,

that the next of kin, or some person nominated by the next of kin, may administer upon the estate of a deceased person. There is no express repeal of any portion of the administration act upon this subject by the terms of the amendment to section 9. Repeals by implication are not favored in the law. But where a subsequent statute is repugnant to a former statute, or inconsistent with it, a repeal of the latter by the former will be implied, or if a repeal is not implied, a modification or exception will be regarded as grafted upon the first statute by the second one. It has been said that where a later statute modifies or creates an exception to an earlier one, the inconsistency between the two statutes is seeming only. In American and English Encyclopedia of Law, (vol. 26,—2d ed.—p. 729,) it is said: "Another instance, in which an inconsistency between two statutes is seeming only and not real, is where the later one can be construed as a modification of or exception to the earlier one." Here, the amendment to section 9 of chapter 86 may be regarded as an exception to the rule laid down in section 18 of the Administration act. The general rule is, as laid down by section 18, that the next of kin, or some person nominated by the next of kin, may be appointed administrator. But, in case of the death of an idiot, lunatic, drunkard or spendthrift, whose estate is under the control of a conservator, the administration may be continued by the conservator instead of being imposed upon the next of kin. "The repeal of an existing law, by implication, is not favored, and it is a familiar rule in the construction of statutes, that the repugnance between statutes must be so clear and plain that they cannot be reconciled, to justify a resort to this doctrine." (*City of East St. Louis v. Maxwell*, 99 Ill. 439).

In *Holton v. Daly*, 106 Ill. 131, it was said (p. 139): "It is a familiar doctrine that repeals by implication are not favored, and that the earliest statute continues in force, unless the two acts are clearly inconsistent with, and repugnant to, each other, or unless in the later statute some express

notice is taken of the former, plainly indicating an intention to repeal it." (See also *Town of Ottawa v. County of La-Salle*, 12 Ill. 339). In 26 American and English Encyclopedia of Law, (2d ed. p. 744,) it is said: "Where a special act refers to or incorporates a general one, the provisions of the special act will prevail over those of the general one conflicting therewith." The amendment of said section 9 expressly refers to the Administration act, when it confers upon the conservator power, under the letters issued to him as conservator, to make settlement of the estate of his deceased ward "without further letters of administration in such time and manner as is required by law of administrators of the estate of deceased persons: *Provided*, this shall not apply to non-resident conservators." The words, "in such time and manner as is required by law of administrators of the estate of deceased persons," are an express reference to the Administration act, and plainly indicate the intention of the legislature to make an exception to the provisions of that act, so far as the administration of the estates of deceased insane wards is concerned. Section 18 of the Administration act provides, that no non-resident shall be appointed administrator, and it was evidently the intention of the amendment to said section 9 to conform to the spirit of the Administration act by the enactment of the provision that said section 9 should not apply to non-resident conservators.

It is also held by the authorities that "a general act will be repealed *pro tanto* by a subsequent special act when the two acts cannot stand together." (26 Am. & Eng. Ency. of Law,—2d ed.—p. 743). The amendment to said section 9 is a special act or provision, and necessarily repeals *pro tanto* the provision of section 18 of the general Administration law, which provides for administration by the next of kin, or a person nominated by the next of kin.

In view of the considerations thus presented, we are of the opinion that, whether the amendment of 1895 to section 9 of the act of 1874 be regarded as a modification of sections

1 and 18 of the Administration act, or as creating an exception thereto, or as operating as a repeal, *pro tanto*, thereof, said amendment is a valid law, and is in force as to the circumstances and class of persons to which it applies. It follows that the county court committed no error in dismissing appellant's petition, and sustaining the appellee's objections thereto.

Consequently, the order or judgment of the county court is affirmed.

Judgment affirmed.

THE CHICAGO AND MILWAUKEE ELECTRIC RAILWAY CO.

v.

ANTON J. VOLLMAN *et al.*

Opinion filed February 21, 1905.

1. EQUITY—*when equity has jurisdiction to enjoin collection of tax.* A court of equity has jurisdiction to entertain a bill to enjoin the collection of a tax alleged to have been extended upon an assessment made by a body having no authority, in law, to make it.

2. TAXES—*Cook county board of assessors may assess property omitted by assessor.* The board of assessors in Cook county have power to assess property notwithstanding the township assessor has omitted the same from the list returned by him to the board. (*Burton Stock Car Co. v. Traeger*, 187 Ill. 9, and *Grant Land Ass. v. People*, ante, p. 256, adhered to.)

APPEAL from the Circuit Court of Cook county; the Hon. J. W. MACK, Judge, presiding.

This is a bill in chancery filed by the appellant, against the appellees, in the circuit court of Cook county, to enjoin the collection of a tax extended upon an assessment made by the board of assessors of Cook county upon its personal property situated in the township of New Trier, in said county, for the year 1902. The court sustained a demurrer

to the bill and dismissed it for want of equity, and an appeal has been prosecuted to this court.

The bill alleges that the Chicago and Milwaukee Electric Railway Company, the appellant, is incorporated under the general laws of this State for the purpose of operating and maintaining an electric railway; that on the first day of April, 1902, it was operating an electric road from the city of Evanston, in Cook county, to the city of Waukegan, in Lake county; that the part of Cook county in which its road is located is wholly within the township of New Trier; that the township of New Trier does not lie wholly within the limits of any one city, and that the personal property of the appellant assessed by the board of assessors was all in that township; that John Shaeffer was the duly elected assessor in said township of New Trier for the year 1902; that he knew the place of the location of the principal office of the appellant and where its officers could be found, but neglected to present to it or them any schedule upon which to list its personal property in said township, and did not request it or any of its officers to make, sign and swear to a schedule of its personal property in said township, and that no schedule was made of its personal property in said township by the appellant for the year 1902; that said assessor on June 23, 1902, returned his lists and assessments of personal property in said township to the board of assessors of said county, and that the name of the appellant did not appear upon said lists or assessments; that between June 23 and July 10, 1902, the board of assessors of Cook county assessed the personal property of the appellant in the township of New Trier at \$250,000; that a tax of \$4902.87 has been extended thereon; that the assessment of appellant's personal property situated in said township of New Trier should have been assessed for the year 1902 by said township assessor and not by the said board of assessors, and that said assessment, by reason of that fact, was void and no valid tax could be extended thereon, and that the appellees, Anton J. Vollman, the township

collector of the township of New Trier, and John Hanberg, county collector of the county of Cook, are threatening to collect said tax by a levy upon the property of appellant situated in said Cook county.

FAYETTE S. MUNRO, (M. F. GALLAGHER, of counsel,) for appellant.

JAMES H. WILKERSON, County Attorney, WILLIAM F. STRUCKMANN, and FRANK L. SHEPARD, for appellees.

Mr. JUSTICE HAND delivered the opinion of the court:

Two questions are discussed in the briefs filed herein: (1) Has a court of equity jurisdiction to enjoin the collection of the tax sought to be enjoined by the bill filed herein; and (2) had the board of assessors of Cook county power to assess the personal property of the appellant situated in the township of New Trier for the year 1902, upon which the tax sought to be enjoined was extended.

The bill was filed by appellant upon the theory the tax sought to be enjoined was extended upon an assessment made by a body that had no authority, in law, to make the assessment, and that the assessment, for want of jurisdiction in the assessing body to make the same, was absolutely void. If the theory of the appellant in that regard was correct, then a court of equity might lawfully enjoin the collection of the tax extended on said assessment. *Kimball v. Merchants' Savings, Loan and Trust Co.* 89 Ill. 611; *Allwood v. Cowen*, 111 id. 481; *Peoria, Decatur and Evansville Railway Co. v. Goar*, 118 id. 134; *Huling v. Ehrich*, 183 id. 315; *Condit v. Widmayer*, 196 id. 623; *Cox v. Hawkins*, 199 id. 68.

In *Peoria, Decatur and Evansville Railway Co. v. Goar*, *supra*, a bill was filed to enjoin the collection of a tax extended upon an assessment of real estate made by the local assessor which had been before that time legally assessed as

"railroad track" by the State Board of Equalization, and it was held the assessment having been made by a person who had no authority, in law, to make the assessment, was void, and the bill to enjoin the collection of the tax extended thereon should have been sustained. And in *Kimball v. Merchants' Savings, Loan and Trust Co. supra*, on page 613, it was said: "The principle of the cases in this court on this subject is, that a court of chancery has jurisdiction, and when invoked will assume to exercise it in all cases where the tax has been levied without authority of law or where the property is not subject to taxation." And in *Huling v. Ehrich, supra* (p. 317): "The board had no jurisdiction to re-assess his property, and in such case equity will restrain the collection of the illegal tax on the ground that the assessment is void as to the increase."

In the county of Cook, which contains more than 125,000 inhabitants, assessments for taxation are made by a board of assessors under the provisions of the act of February 25, 1898, (Hurd's Stat. 1903, p. 1559,) and the board of assessors of said county had the power to assess the personal property of the appellant in the township of New Trier for the year 1902, although the same had been omitted by the assessor for the township for that year. *Burton Stock Car Co. v. Traeger*, 187 Ill. 9; *Grant Land Ass. v. Pcoyle, ante*, p. 256.

The soundness of the doctrine announced in the foregoing cases is challenged by appellant. In those cases it was held the act of 1898 provided for two classes of deputy assessors in Cook county,—those appointed by the board for the city of Chicago and those elected for the townships situated outside the city,—but that the difference between said deputy assessors was not one of power to make assessments, but lay wholly in the fact that one class was appointed and the other class elected; that both were deputy assessors only, and performed the same duties and were under the direction and supervision of the board of assessors. Sections 7 and 8

of said act provide that all property in the State, except such as is exempt from taxation, shall be assessed with reference to ownership, amount, kind and value as of the first day of April in each year. Section 54 of the act provides the boards of assessors elected under its provisions shall perform the duties and have the powers in relation to assessment of property imposed upon or possessed by county or township assessors by law; and section 57, that in counties to which said act applies the township assessors shall not have the power or duty of assessing property except as otherwise provided in said act.

From a careful consideration of all the provisions of the act of 1898 we are disposed to adhere to the holding in *Burton Stock Car Co. v. Traeger, supra*, and *Grant Land Ass. v. People, supra*, that in counties where there is a board of assessors, assessments for taxation are made by the board of assessors and not by the deputy assessors, whether appointed or elected, and that the deputy assessors, whether appointed or elected, are under the control and direction of the board of assessors, and that it is the duty of said board of assessors to assess all property in the county not exempt from taxation, although said property may have been omitted by a deputy assessor from the lists or assessments returned by him to the board of assessors. The personal property of the appellant in New Trier township was therefore lawfully assessed in the year 1902 by the board of assessors, and the circuit court did not err in refusing to enjoin the collection of the tax extended thereon on the ground that said assessment was void by reason of its having been made by the board of assessors and not the township assessor.

The decree of the circuit court will be affirmed.

Decree affirmed.

JAMES H. BARKLEY

v.

THOMAS J. DALE, County Clerk.

Opinion filed February 21, 1905.

1. *TAXES—board of review cannot review assessment of credits for a previous year.* When credits have been assessed by the assessor, the tax extended and paid, a board of review in a subsequent year cannot review and increase such assessment under the guise of assessing credits omitted in the previous years.

2. *SAME—under-valuation not of itself evidence of fraud.* The fact that there appear of record in the name of a tax-payer unreleased mortgages to an amount larger than his assessment for credits, does not, of itself, render the assessment so fraudulent as to amount, in law, to no assessment at all, and justify an assessment of the credits as omitted property for each of the years such condition existed.

3. *SAME—board of review has no power to act after returning books.* The provision of section 38 of the Revenue act of 1898 that the board of review shall complete its work on or before the seventh of September, is so far directory that the board may continue its session after that date until it completes the work then pending before it; but after turning over the books to the county clerk, with the necessary affidavit, its jurisdiction to act as a board of review for that year, except in counties of certain population, ceases.

4. *SAME—when assessment of omitted property is void.* An assessment of credits as property omitted in previous years, made by the board of review after it has turned over the books to the county clerk with the affidavit showing that it has completed its work, is void, notwithstanding notice to the tax-payer to appear for examination was given before the books were returned.

5. *SAME—when county tax is void.* A county tax levied by a resolution of the board of supervisors which fails to state separately the amount to be raised for each purpose for which the tax was sought to be levied, is void.

APPEAL from the Circuit Court of Vermilion county; the Hon. JAMES W. CRAIG, Judge, presiding.

F. K. DUNN, FRANK LINDLEY, and O. M. JONES, for appellant.

J. B. MANN, and SWALLOW & SWALLOW, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

This is a bill in chancery filed in the circuit court of Vermilion county by the appellant, against the appellee, to enjoin the appellee, as county clerk of the said county, from extending against the appellant any taxes or penalties upon certain assessments made by the board of review of said county in the year 1903 upon credits claimed to have belonged to the appellant, and which were said to have been omitted by the assessor of the town in said county in which the appellant resided from the assessment of appellant for the years 1883 to 1898, both inclusive. A temporary injunction was granted, and afterwards the bill was amended and an answer and replication were filed, and upon final hearing a decree was entered perpetually enjoining the extension of all taxes upon assessments made for the years 1883 to 1892, both inclusive, and the temporary injunction was dissolved as to the extension of all taxes upon the assessments for the years 1893 to 1898, both inclusive, excepting certain town, road and bridge and school taxes for those years, which were held not to have been lawfully levied.

The decree finds and the evidence shows that the appellant was assessed by the town assessor upon credits in the years 1883 to 1898, both inclusive, and that taxes for each of said years were extended upon said assessments and paid by the appellant, and the contention is made that the board of review in the year 1903 was without authority of law to assess the appellant upon omitted credits for each of those years. We think the position assumed by appellant is sound and must be sustained, under the repeated decisions of this court, if the assessments made for credits against the appellant for the years 1883 to 1898, both inclusive, by the town assessor, were valid assessments. (*Allwood v. Cowen*, 111 Ill. 481; *People v. Sellars*, 179 id. 170; *Sellars v. Barrett*,

185 id. 466; *In re Appeal of Wilmerton*, 206 id. 15.) The appellant was not a banker, broker or stock jobber, and in the assessment of his credits it was the duty of the assessor to first ascertain the total amount of his credits and to deduct therefrom the total amount of his *bona fide* indebtedness, and to assess him upon the balance remaining as credits for each of the years in which the assessment was made. The determination of the amount of credits for which the appellant should be assessed each year by the assessor involved the exercise of judgment on the part of the acting assessor, and the law has not conferred upon the board of review the power to correct or revise the judgment and determination of an assessor as to the proper amount at which the credits of a tax-payer shall be assessed, and to assess the same as omitted credits in a year subsequent to the year in which the assessment was made. A board of review has the right, and it is its duty, at the time and in the manner pointed out by the statute, to revise the assessments made by the town assessors in the year in which assessments are made by said town assessors, and may increase or diminish such assessments; but when credits have been assessed and taxes extended upon the assessment and paid by the tax-payer, a board of review in a subsequent year is powerless to review and increase such assessment upon the theory that the assessment is too low and that the board is engaged in assessing omitted credits.

It is, however, said the assessments for the years 1883 to 1898, both inclusive, (and the court seems to have adopted that view as to the years 1893 to 1898, both inclusive,) were for so low an amount, as compared with the credits owned by the appellant in each of those years, as to make the said assessments fraudulent, and to amount, in law, to no assessment at all, and that by reason of that fact, under the authority of *Sellers v. Barrett*, *supra*, the board of review might assess the appellant upon omitted credits for the years 1883 to 1898, both inclusive, upon the ground that he had not been assessed at all upon credits. It has been held that

an assessment may be impeached for fraud, and by reason of fraud in making the assessment an assessment may amount to no assessment at all. (*State Board of Equalization v. People*, 191 Ill. 528). It is, however, held that an over or under-valuation of property will not, of itself and alone, establish that an assessment was fraudulently made. (*Union Trust Co. v. Weber*, 96 Ill. 346; *Keokuk and Hamilton Bridge Co. v. People*, 145 id. 596; *Spring Valley Coal Co. v. People*, 157 id. 543.) We find no evidence of actual fraud in this record, and are of the opinion fraud cannot be implied from the fact, alone, that there appeared of record in Vermilion county, during each of the years 1883 to 1898, both inclusive, in the name of appellant, unreleased mortgages to an amount larger than his assessment for credits during each of those years. The appellant testified, and he was uncontradicted, that during each of the said years he returned to the assessor the true amount of all his credits, and there is no showing that said mortgages were not actually assessed in those years. If they were assessed, although for too low an amount, the board of review in 1903 had no right to re-assess them on the theory they had been assessed too low, any more than said board would have the right in that year to re-assess the hogs, horses and cattle of appellant, if any, assessed in each of the years from 1883 to 1898, inclusive, on the theory said property had been assessed at too low an amount, and said board could not validate such assessment by returning it as omitted property.

It appears that the board of review in Vermilion county met on July 8, 1903; that it returned to the county clerk the assessment books, with the necessary affidavits attached thereto, showing it had completed its work for the year 1903 on the 28th day of September. Prior to the 28th day of September,—the day on which the board returned the assessment books to the county clerk,—it had notified the appellant to appear on October 7, 1903, before the board for examination as to his property, for the purposes of assess-

ment. The appellant appeared on the 8th day of October, 1903, and on subsequent days was examined by and before the board, and the board did not complete the examination of the appellant and make a report to the county clerk of the amount of omitted credits assessed against the appellant for the years 1883 to 1898, both inclusive, until December 4, 1903, and the contention is made that said board of review, after September 28, was without jurisdiction to make said assessments for omitted credits against the appellant. We think this contention is correct. Section 34 of the act of 1898, by which boards of review were created, provides that such boards shall meet on or before the second Monday of July in each year for the purpose of revising the assessments of property in their county. Paragraph 1 of section 35 of said act defines the duties of said board, and among other things provides the board shall assess all property subject to assessment which shall not have been assessed by the assessors, and under this provision it has been held by this court (*People v. Sellars, supra*,) that it is the duty of boards of review to assess omitted property under section 276 of the Revenue act; and by section 38 of the former act it is provided the board of review shall, on or before the 7th day of September, annually, complete its work, and make, or cause to be made, the entries in the assessment books required to make the assessment conform to the changes made therein by the board of review, and shall attach to each of said books an affidavit signed by at least two members of said board, a form of which affidavit is given, and which states that the books returned contain a full and complete list of the real and personal property in said county subject to taxation for said year; and section 40 provides that a failure to complete an assessment in the time provided by law shall not vitiate the assessment; and a proviso to section 38 is to the effect that in counties containing one hundred and twenty-five thousand or more inhabitants, within which class Vermilion county does not fall, the board of

review shall meet from time to time, and whenever necessary, to consider and act upon complaints, and to further revise the assessment of real property as may be just and necessary; and section 43 provides, when the books are completed, for the return of those containing the assessment of personal property to the county clerk, who shall file the same in his office, and that the assessment so completed by the board of review, and as equalized by the State Board of Equalization, as provided by law, shall be the assessment upon which the taxes for the year shall be extended by the county clerk.

We think, from a consideration of all of said sections, that the provision in section 38 that boards of review shall complete their work on or before the 7th day of September, annually, in view of section 40, is so far directory that the board may continue its sessions until it has completed the work then pending before it, and is prepared to return the assessment books to the county clerk. It is clear, however, when a board of review has completed its work and attached the necessary affidavit to the assessment books and returned said books to the county clerk, that the jurisdiction to act of said board of review for that year, except in counties of one hundred and twenty-five thousand or more inhabitants, which is covered by the proviso to section 38, has ceased, and that an assessment of omitted credits made by the board of review after the assessment books have been returned by the board to the county clerk is void.

It also appears from this record that the county taxes in Vermilion county for the years 1883 to 1898, both inclusive, were levied by the board of supervisors of said county by a resolution which did not state separately the amount to be raised for each purpose for which the tax was sought to be levied. The failure to state the amount for each purpose for which the tax was to be levied, under the authority of *Chicago, Burlington and Quincy Railroad Co. v. People*, (ante, p. 458,) and *Cincinnati, Indianapolis and Western Railway*

Co. v. People, (ante, p. 197,) was a fatal defect in the levy of said county tax for each of said years, and the county tax for those years attempted to be levied in said county was void, and said assessment for that reason could not lawfully be made for the purpose of raising a fund with which to pay the county tax in said county for each of said years.

The decree of the circuit court will therefore be reversed in so far as the court refused to enjoin the extension of all taxes upon the assessments for omitted credits against the appellant for the years 1893 to 1898, both inclusive, and in all other particulars it will be affirmed, and the cause will be remanded to the circuit court, with directions to enter a decree enjoining the extension of all taxes upon said assessments for the years 1893 to 1898, both inclusive.

Reversed in part and remanded, with directions.

WALTER SHERIFFS

v.

THE CITY OF CHICAGO.

Opinion filed February 21, 1905.

1. SPECIAL ASSESSMENTS—*a supplemental assessment cannot be made before work is completed and deficiency determined.* A supplemental assessment, under section 59 of the Local Improvement act, cannot be made before the improvement is completed and the deficiency ascertained.

2. SAME—*improvement not completed until accepted by board.* An improvement is not completed, so that the deficiency may be ascertained, until the board of local improvements has accepted the improvement as complying with the contract and ordinance and has ascertained the cost thereof.

3. SAME—*confirmation judgment is prima facie an adjudication of benefits.* A judgment confirming a special assessment is *prima facie* an adjudication that the property has been assessed as much as it will be benefited by the improvement. (*McChesney v. Chicago*, 188 Ill. 423, and *Chicago v. Noonan*, 210 id. 18, followed and distinguished from *Cody v. Town of Cicero*, 203 id. 322.)

APPEAL from the County Court of Cook county; the Hon. W. H. HINEBAUGH, Judge, presiding.

GEORGE A. MASON, for appellant.

ROBERT REDFIELD, and FRANK JOHNSTON, Jr., (EDGAR B. TOLMAN, Corporation Counsel, of counsel,) for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

This was a proceeding under section 59 of the Local Improvement act, to confirm a supplemental assessment to pay a claimed deficiency for a street improvement in South Jefferson street from West Sixteenth street to West Twenty-second street, in the city of Chicago. The appellant filed objections, which were overruled, and judgment of confirmation having been entered against his property he has prosecuted this appeal, and urges two grounds for reversal: First, the court erred in confirming said supplemental assessment, as it was spread before the improvement was completed and the cost thereof ascertained; and second, that the court refused to hold, upon the trial of the question of benefits, that the judgment of confirmation in the original proceeding was *prima facie* an adjudication that the property of appellant had been assessed in that proceeding as much as it would be benefited by the improvement.

It appears from the record that the original assessment against appellant's property for the sum of \$5523.12 was confirmed November 15, 1901; that the contract for the improvement was let on April 23, 1902, for the sum of \$45,-076.50; that the ordinance for the supplemental assessment was passed September 29, 1902; that October 21, 1902, the petition for confirmation of the supplemental assessment was filed; that November 11, 1902, the supplemental assessment roll was filed, and December 8, 1902, the board of local improvements inspected and accepted the improvement.

In *City of Chicago v. Noonan*, 210 Ill. 18, and *City of Chicago v. Richardson*, (*ante*, p. 96,) it was held that a sup-

plemental assessment under section 59 of the Local Improvement act could not be made until the amount of the deficiency had definitely been determined, and that the deficiency could not be determined until after the improvement was actually completed. It is said by the appellee that at the time the proceedings to levy the supplemental assessment in this case were commenced the improvement was completed as a matter of fact although it had not been inspected and accepted by the board of local improvements, and to sustain such contention reliance is based upon a communication of its engineer to the board of local improvements dated October 4, 1902. We do not think the communication of the engineer to the board referred to will bear the construction placed thereon by the appellee. It advised the board that the contractor had "applied for a final estimate on its contract," and then set forth the "assistant engineer's estimate of work done to date." If, however, said communication did show the improvement to have been completed on October 4, the ordinance providing for the supplemental assessment, and which was the basis of the assessment, was passed prior to that date. The question whether the improvement had been completed before the supplemental assessment proceedings were commenced was not, however, a question to be determined by the engineer, as the determination of that question is by the statute delegated to the board of local improvements. By the Local Improvement act the board of local improvements is authorized to make all contracts for local improvements, and such improvements are to be constructed under the direction and to the satisfaction of said board, and when completed are to be accepted by the board, and after the completion and acceptance of the improvement the cost of the improvement is to be determined by the board. The improvement, therefore, within the meaning of the law, can not be said to have been completed, so that the deficiency can be definitely determined, until after the board of local improvements has determined it has been completed in accord-

ance with the terms of the contract and the ordinance and the improvement has been accepted and the cost thereof ascertained by the board. As this was not done until December 8, which was long after the supplemental proceedings were commenced, those proceedings were prematurely commenced, and were invalid.

Upon the trial of the question of benefits a jury was waived and that question was submitted to the court. On the hearing the appellant introduced in evidence the judgment of confirmation against his property in the original proceeding and rested. The appellee introduced no proof other than the preliminary proofs showing the court had jurisdiction, and the amount of the supplemental assessment. In *McChesney v. City of Chicago*, 188 Ill. 423, on page 426, it was said: "When, as here, the ordinance providing for an improvement is valid but the estimate of the cost of the improvement proves too low, the course to be pursued by the said city is that indicated in said section 59. In such case the judgment, under the ordinance assessing the benefits to any parcel of property, stands *prima facie* as an adjudication of that question, and conclusively as an absolute adjudication, if upon the former hearing it was specially found, in terms, that the property objected for would be benefited no more than the amount assessed against it. As to any property as to which such special finding referred to was made there could be no additional assessment, and as to other property the burden would be upon the city to show that such property would be benefited in a greater amount than shown by the prior adjudication." And in *City of Chicago v. Noonan*, *supra*, in considering section 59 of the Local Improvement act, on page 24, it was said: "We do not think that the foregoing construction of the statute will necessarily result in depriving a property owner of any of his legal rights. When notified of the public hearing on the first recommendation of the board he is informed of the estimated cost of the improvement, and must be presumed himself to have some

knowledge as to whether the estimate is a reasonably fair one. He is also chargeable with knowledge of the provisions of section 59, authorizing a deficiency assessment in case the first proves insufficient. He is also, by the provisions of the same section, protected against the liability of having his property assessed for more than it is benefited. If that question has been settled in the prior proceeding then it is final; if not, it is at least *prima facie* evidence that it has been assessed as much as it is benefited."

It is urged by appellee that the *McChesney* and *Noonan* cases are in conflict with *Cody v. Town of Cicero*, 203 Ill. 322. In the *Cody* case the contention was made that the original judgment of confirmation was *res judicata* of the question of benefits as to all the property covered by the original assessment and controlled in the levy of the supplemental assessment. In that case the original judgment was entered by default and the question of benefits was not expressly determined, and it was there held, as it was in the *McChesney* and *Noonan* cases, that the question of benefits not having been definitely settled in the original proceeding the city was not foreclosed upon that question in the supplemental proceeding, and the court permitted proofs upon the question of benefits, but the question of whether the original judgment was *prima facie* evidence that the property assessed in the original proceeding had been assessed as much as it was benefited by the improvement was not raised. There is no conflict between the cases referred to, and the correct rule was announced in the *McChesney* and *Noonan* cases.

The judgment of the county court of Cook county will be reversed and the cause remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

ELIZABETH BIGGINS

v.

DANIEL LAMBERT.

Opinion filed February 21, 1905.

1. *WILLS*—*provision of will construed as not requiring widow to make equal provision for children.* A provision of a will leaving certain described real estate and all personal property to the widow, with directions for her to provide, before her death, for two named children, "out of the above described property," does not require her to divide the property equally between them, nor preclude her from giving personal property to one and land to another.

2. *DEEDS*—*when grantee is not entitled to relief as against third party.* On bill to set aside a deed as in fraud of the rights of a judgment creditor of the grantor, if the evidence tends to show that both grantor and grantee participated in the fraud, the grantee, as against the judgment creditor, is not entitled to protection to the extent of the consideration paid by her for the property.

3. *APPEALS AND ERRORS*—*effect where judge from whom change of venue was taken hears case in Appellate Court.* The fact that the judge from whom a change of venue was taken on the ground of prejudice afterwards sits as a member of the Appellate Court when the case is heard there, is not ground for reversing the judgment of the Appellate Court.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Will county; the Hon. JOHN SMALL, Judge, presiding.

W. P. BLACK, and J. W. DOWNEY, for appellant.

J. L. O'DONNELL, for appellee.

Mr. CHIEF JUSTICE RICKS delivered the opinion of the court:

This is an appeal from a judgment of the Appellate Court for the Second District affirming a decree of the circuit court of Will county setting aside, as fraudulent as to the rights of appellee, a certain deed from John Ward to Eliza-

both Biggins, his sister, the appellant herein. The appellee had recovered in said circuit court a judgment for \$5000 in an action of tort against the said John Ward for the seduction of his daughter, Catherine Lambert. Execution having been issued on said judgment and returned unsatisfied, the appellee herein began this suit for the purpose of setting aside the deed above referred to and subjecting the property purporting to be conveyed by said deed to the satisfaction of said judgment. The relief prayed in appellee's bill was decreed by the circuit court, and on appeal to the Appellate Court that decree was affirmed and now this further appeal is prosecuted; it being contended by appellant that the circuit and Appellate Courts erred both in the application of law and the finding of facts.

The father of John Ward, Daniel Ward, originally owned the land here in controversy. He died October 24, 1897, leaving a last will and testament, by which he made certain devises to all his children except John and Elizabeth, the defendants in this suit. As to them, however, mention was made in the third clause of the will, which, together with the fourth clause, is as follows:

"Third—I give and bequeath to my wife, Catherine Ward, the real estate described as W. $\frac{1}{2}$ S. W. $\frac{1}{4}$, sec. 5, 40 acres, and the W. $\frac{1}{2}$ N. W. $\frac{1}{4}$, sec. 5, 81.14 acres, and all appurtenances on the premises of every kind, including all the personal property, household furniture and farm implements, and live stock, grain, corn, oats, hay, straw, fowl, all cash money on hand, in whosoever hands it may be, and all notes. The real estate above described is in town of Lockport, 36, range 10, east, Will county, Illinois. I hereby ordain that my wife, Catherine Ward, shall provide, before her death, out of the above described property, for my two children, John Ward and Elizabeth Biggins.

"Fourth—I ordain and appoint my wife, Catherine Ward, executrix of this my last will and testament, to serve without bond."

On January 12, 1900, Catherine Ward, the mother of appellant, at her home, executed to John Ward a deed to the west half of the north-west quarter and the north half of the west half of the south-west quarter of section 5, township 36, north, range 10, east of the third principal meridian, in the township of Lockport, Will county. It seems to have been conceded in the previous proceedings that the description given in this deed is the correct one and covers the same land sought to be described in the third clause of the will above referred to. However that may be, it is the deed afterwards executed by John Ward to Elizabeth Biggins, purporting to convey the land last described that is sought to be set aside. The deed from Catherine Ward to John Ward was not recorded until March 12, 1901. On March 11, 1901, John Ward and Elizabeth Biggins went to the office of their attorney, in Joliet, and there John Ward made to Elizabeth Biggins a bill of sale of all the personal property and the homestead, being the land in controversy, where John Ward had been farming since his father's death, the said personal property being estimated to be of the value of \$3000. He also made and delivered to her a deed for this same land and as described in the deed to him from his mother, the expressed consideration being \$8000, Elizabeth Biggins paying for all this property \$1900 in cash, but giving no notes or any other evidence of indebtedness as to the balance of the purchase price. The deed from Catherine Ward to John Ward, which had never been recorded, was, and had been for some time, in the possession of the attorney in whose office the parties were, and who the next day had both the deed to John Ward and the deed to Elizabeth Biggins filed for record.

There is a conflict in the evidence as to when the deed executed by Catherine Ward to John Ward was delivered,—whether at the time of its execution or not until the 11th of March, 1901, when the deed of John Ward to Elizabeth Biggins was executed, it being contended on the part of

appellant that up to this time the deed to John Ward was being held in escrow by his attorney. We deem it unnecessary for us to enter upon a consideration of this question, as, under the view we take, that question is not vital to our decision.

It is first contended by appellant that "the devise, in the third clause of the will of Daniel Ward, of the real estate involved in this suit, to Catherine Ward, imposed upon the land in her hands a trust in favor of John Ward and Elizabeth Biggins," and it is insisted that the deed of John Ward to Elizabeth Biggins, on this theory of the case alone, must be sustained, at least to the extent of a one-half interest in the lands, the equitable title to which, it is said, was at the time in appellant under the provisions of her father's will. For the purpose of this argument it may be conceded that Catherine Ward did take the property devised to her in her husband's will burdened with the trust of making provision therefrom for the children John and Elizabeth, but after this concession there is nothing in the will or in the authorities cited by appellant to indicate that John and Elizabeth should receive equal shares of this property or that the land should be equally divided between them. In clauses of the will preceding the one set out herein the testator bequeathed to certain children bodies of land of different extent, and there is nothing to indicate, even if it be said that it was the testator's intention that the land here in controversy should eventually go to his children John and Elizabeth, that they should participate equally therein. The testator left considerable personal property, which, under the third clause of the will, went to the widow, Catherine Ward. Among the items of personal property so left was a note for \$1554.38, which, with three years' interest thereon, the evidence shows the widow gave to and the same was collected by Elizabeth Biggins. There is also evidence tending to show that Catherine Ward did provide, out of the property left her by her husband, for the children Elizabeth and John, and by which

provision Elizabeth was to receive, or had received, her share in money and John was to have the farm, and in accordance with that provision the farm was deeded to John by his mother. If the chancellor before whom the case was tried believed the evidence introduced on behalf of appellee, he was justified in believing that there was an arrangement to this effect, and if so, then appellant's position that the property devised in the third clause of the will was burdened with a trust provision for said children may be conceded and still the decree of the lower court is not subject to attack on the ground that the court misconstrued the clause of the will in question, for there is nothing in that clause from which the inference can logically be drawn that it was incumbent upon Catherine Ward to provide, out of the means left her, shares similar in nature and amount for the two children named in said clause. If Catherine Ward considered it better that the land should go to John and that Elizabeth should receive her share in money, as the evidence tends to show the division was made, under the will she had a right to so divide the estate; and if the chancellor believed, from the evidence, that after such division had been made and John Ward had become invested with the title to the land in question he fraudulently conveyed the same to his sister, Elizabeth, who was also guilty of complicity in said fraud, then the decree is not erroneous.

It is further contended by the appellant that the evidence fails to show any guilty intent or knowledge on the part of Elizabeth Biggins, or even any fraud on the part of John Ward, as to this conveyance, each of which is necessary to be shown in order to impeach and set aside the deed in question. In the consideration of this point it is not necessary that we set out the evidence tending to support the findings of the chancellor as to the existence of fraud. We have carefully reviewed the evidence presented by the abstract furnished us. It is very conflicting. There is evidence which, if believed by the chancellor, amply justifies the conclusions

reached by him. He saw and heard the witnesses, and had much better opportunity for judging as to the weight that should be attached to the testimony of the various witnesses than have we. Under such circumstances the rule is well settled that this court will not disturb the findings of the chancellor unless manifestly and palpably wrong. We can not say, from the evidence before us, that the conclusions reached by the chancellor are manifestly erroneous. Leaving out of consideration the conflicting statements of the witnesses, many circumstances about which there is no question appear that of themselves are strong badges of fraud.

Appellant also contends that the conveyance should in no event be set aside for more than the excess of the value of the property over the consideration actually paid, on the theory that, as to appellant, the conveyance cannot be held to be, at most, more than constructively fraudulent. As we have said, there is evidence, in our judgment, tending to establish guilty knowledge or intent on the part of appellant, and if she participated in the fraud then she cannot be afforded any relief, and while the transfer was void as to third parties, yet as between the parties to the transaction it will be regarded as binding. 14 Am. & Eng. Ency. of Law, (2d ed.) 273.

Finally, it is suggested that because a change of venue in the circuit court was taken from one judge on the ground of prejudice, and that same judge afterwards sat as a member of the Appellate Court before whom this case was taken, that was prejudicial error. We do not think so. The Appellate Court was composed of three judges, at least two of whom were not subject to the objection made.

Upon a review of the record before us we find no reversible error, and the judgment of the Appellate Court is affirmed.

Judgment affirmed.

THE CENTRAL RAILWAY COMPANY

v.

CARRIE ANKIEWICZ.

Opinion filed February 21, 1905.

1. INSTRUCTIONS—*when instruction as to form of verdict is not objectionable.* An instruction giving the following form of verdict in case the jury found for the plaintiff: "We, the jury, find the defendant guilty and assess the damages at \$....., filling in the blank space with whatever amount you may find, if any," etc., is not objectionable as permitting the jury to award whatever damages they might choose, although no instruction as to the measure of damages was asked or given.

2. SAME—*party cannot predicate error on failure to give an instruction not requested.* Defendant in an action for personal injuries cannot urge a ground of reversal based upon the absence of any instruction upon the measure of damages, if no instruction upon that subject was requested.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the Hon. N. E. WORTHINGTON, Judge, presiding.

I. C. PINKNEY, for appellant.

THOMAS N. HASKINS, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The Appellate Court for the Second District affirmed a judgment recovered by appellee against appellant in the circuit court of Peoria county for damages on account of personal injuries alleged to have been sustained while alighting from one of appellant's street cars.

The only error alleged is the giving to the jury of the following instruction:

"The court instructs the jury that if you find the issues for the plaintiff, the form of your verdict may be: 'We, the jury, find the defendant guilty and assess the damages at \$.,'—filling the blank space with whatever amount you may find, if any, writing the same on a separate sheet of paper and signing the same by your foreman."

It is said that it was prejudicial error to give this instruction because it permitted the jury to award such damages as they might choose, without confining them to the evidence or stating any legal rule for the allowance of damages. We do not consider the instruction subject to the objection made. It did not purport to lay down any rule for the assessment of damages or indicate to the jury that they were at liberty to award whatever amount they might think the plaintiff ought to recover. It merely gave to the jury a form of verdict in case they should find for the plaintiff, and as the amount of damages was necessarily left blank, it directed the jury to fill the blank space with the amount of damages awarded. It did not say to the jury that they might fill the blank with whatever amount they might see fit to award the plaintiff as damages, but only that the amount awarded should be inserted. There was nothing objectionable about the instruction, and the most that can be said is, that the jury were not instructed at all as to the measure of damages or the rules of law for estimating the same. There was no instruction on that subject, and it seems that neither party desired to have the court instruct the jury concerning damages. Appellant cannot complain that an instruction was not given which was not requested. *Drury v. Connell*, 177 Ill. 43; *Malott v. Hood*, 201 id. 202.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

VICTORINE GRIVEAU

v.

THE SOUTH CHICAGO CITY RAILWAY COMPANY.

Opinion filed February 21, 1905.

1. APPEALS AND ERRORS—*mere assertion that constitutional question is involved is not sufficient.* Before the Supreme Court will take jurisdiction on the ground that a constitutional question is involved it must appear from the record that a fairly debatable constitutional question was urged in the trial court, the ruling on which is preserved in the record for review and error assigned thereon.

2. SAME—*when constitutional question is not open for review.* A constitutional question which has been passed upon and settled in the Supreme Court will be considered as no longer debatable, and will not furnish a ground for taking a case to the Supreme Court which should otherwise have gone to the Appellate Court, unless special reasons appear for a further consideration of the question.

WRIT OF ERROR to the Superior Court of Cook county;
the Hon. ELBRIDGE HANEY, Judge, presiding.

This is an action on the case commenced in the superior court of Cook county by the plaintiff in error against the defendant in error, to recover damages to certain real estate situated upon Madison avenue, in the city of Chicago, upon which is located a store and flat-building. The declaration contains one count, and avers that the plaintiff is the owner of said premises in fee simple and in the possession thereof by herself and tenants; that the defendant purchased lots adjoining the said premises and constructed thereon a loop terminal for its street car line, and in connection therewith erected a station platform thereon where it receives and discharges passengers; that its car tracks are laid around said lots at a sharp curve and that in running its cars around said loop a grating noise is made; that passengers taking defendant's cars at that place are boisterous and noisy and that bells are rung at intervals, thereby disturbing the rest and quiet of the plaintiff and her tenants, and that one of the car

tracks connecting the main line in the street with said loop curves across the street in front of the plaintiff's premises, whereby the value of the premises of the plaintiff has been damaged, etc.

The general issue was filed, and, after the evidence of the plaintiff was submitted to the jury, upon the motion of the defendant the court struck out all the evidence and peremptorily directed a verdict in favor of the defendant and rendered judgment thereon, and the plaintiff has sued out a writ of error direct from this court to review the action of the trial court, and urges as grounds for reversal the following reasons: The refusal of the court to admit the inventory in evidence as proof of the specific property conveyed by the will of Adolph Godard to plaintiff, the striking out of all of the plaintiff's evidence, and the giving of the instruction to find the defendant not guilty.

EDWIN BEBB, and F. H. CULVER, for plaintiff in error.

JAMES W. DUNCAN, and C. LEROY BROWN, for defendant in error.

Mr. JUSTICE HAND delivered the opinion of the court:

It is contended that a construction of the constitution is involved, and for that reason the writ of error was properly sued out from this court. The assertion of counsel that a constitutional question is involved is not alone sufficient to give this court jurisdiction, (*St. Louis Transfer Co. v. Canty*, 103 Ill. 423; *Rowell v. Covenant Mutual Life Ass.* 176 id. 557; *Skakel v. People*, 188 id. 291;) but before this court will take jurisdiction, upon appeal or writ of error, upon the ground that a construction of the constitution is involved, it must appear from the record that such question is involved, and it must be a fairly debatable question raised in good faith, and not simply pretendedly, for the purpose of giving this court jurisdiction; (*Chaplin v. Comrs. of Highways*,

126 Ill. 264; *Beach v. Peabody*, 188 id. 75; *St. Louis Transfer Co. v. Canty*, *supra*;) and although it may appear a constitutional question was involved in the trial court, unless such question is preserved in the record and the ruling of the court thereon is assigned as error the question will not be considered by this court, but the appeal or writ of error will be dismissed. (*Skakel v. People*, *supra*.) It does not appear from the record that a construction of the constitution was involved on the trial, and no constitutional question is raised by the assignment of errors attached to the record. The record should therefore have been taken for review, in the first instance, to the Appellate Court.

It is urged that the cases of *Aldrich v. Metropolitan West Side Elevated Railroad Co.* 195 Ill. 456, and *Aldis v. Union Elevated Railroad Co.* 203 id. 567, were brought directly to this court, and that the court took jurisdiction thereof and disposed of them upon their merits. In those cases the construction of section 13 of article 2 of the constitution of 1870 was involved and the construction of that constitutional provision was properly preserved for review, and the rulings of the trial court made in those cases upon such question were assigned as error. In *Illinois Central Railroad Co. v. Turner*, 194 Ill. 575, *Calumet and Chicago Canal and Dock Co. v. Morawetz*, 195 id. 398, and *Illinois Central Railroad Co. v. Trustees of Schools*, 212 id. 406, the questions involved were substantially the same as the questions involved upon this record. Those cases came to this court through the Appellate Court.

If a constitutional question has been passed upon by this court, that question will be held to be settled and not to be a debatable question in this court, and if a case involving the construction of such constitutional provision is brought to this court which otherwise should go to the Appellate Court, unless special reasons appear for its further consideration such question will be deemed to be no longer a debatable question and open for review in this court.

As no constitutional question is involved upon this record or raised by the assignment of errors attached thereto, this court is without jurisdiction to entertain this writ of error, and the same will accordingly be dismissed.

Writ dismissed.

THE N. K. FAIRBANK COMPANY

v.

MARY BAHRE.

Opinion filed February 21, 1905.

1. PLEADING—*what is a sufficient averment in absence of a demurrer.* In the absence of a demurrer, an averment in a declaration for nuisance that the noxious odors emitted from substances deposited by the defendant upon a lot adjoining plaintiff's premises "caused much sickness in plaintiff's immediate vicinity, and plaintiff and her family have been sick, sore, lame and disabled as the result of the presence of said substances," is a sufficient averment that the noxious odors came upon plaintiff's premises.

2. NUISANCE—*in case of temporary nuisance, only damages sustained before suit may be proved.* In an action for a temporary nuisance caused by depositing soap stock upon a lot adjoining the plaintiff's premises, the plaintiff's right of recovery is limited to the damages sustained up to the commencement of the suit.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. JOSEPH P. ROBARTS, Judge, presiding.

OLIVER & MEGARTNEY, for appellant.

MASTERTON & HAFT, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The Appellate Court for the First District affirmed a judgment in the sum of \$3000, entered in the circuit court of Cook county in favor of the appellee and against the

appellant company, in an action on the case brought by the appellee against the appellant company for maintaining a nuisance, and this is an appeal from the judgment of affirmance.

It is first urged that the declaration is fatally defective, and that for that reason the trial court erred in overruling appellant's motion in arrest of judgment. The declaration averred, in substance, that the plaintiff was the owner of certain premises in Cook county, Illinois, which were the home of herself and her family, consisting of several children; that the appellant company was the owner of a certain lot adjoining the property and home of the plaintiff, and that it deposited thereon large quantities of poisonous, rancid and injurious matter, all of which emitted foul, obnoxious and injurious odors, which said substances, and the odors emitted therefrom, caused the plaintiff and her family to become sick, sore, lame and disabled; that many people living in the immediate vicinity sickened and died as the result of such noxious substances and vile and unhealthy odors; that the market value of plaintiff's property had been greatly diminished by such acts of the appellant company, and that such acts were for the purpose of depreciating the value of her property, in order that the appellant company might become the purchaser thereof from her at less than its value, etc. The contention is, the declaration does not state a good cause of action, for the reason it is not, in terms, averred that the odors from the poisonous, noxious and decaying substances reached and permeated the air in and upon the premises of the plaintiff.

The appellant company did not demur, but pleaded to the declaration. The declaration averred "that the substances deposited by defendant, and the odors emitted therefrom, have caused the death of a large number of the Fairbank Company's horses and have caused much sickness in plaintiff's immediate vicinity, and plaintiff

and her family have been sick, sore, lame and disabled as the result of the presence of said substances." The careful pleader would have expressly averred that the noxious odors came unto and into the premises of the plaintiff. That such was the fact and was intended to be charged to be the fact is fairly inferable from the facts stated in the declaration. On demurrer the intendments are against the pleader, and mere inferences or implications from facts stated cannot be indulged in his favor. If, however, the defendant does not question the sufficiency of the declaration by demurrer but joins in raising an issue of fact and in submitting such issue to a jury for decision, and judgment is rendered against him, then the court will, on motion in arrest of judgment, indulge in intendments in favor of the sufficiency of the declaration, and will regard as sufficiently alleged any material fact which is fairly and reasonably inferable from facts stated in the declaration, and if the material fact is fairly inferable from the facts stated and may fairly be presumed to have been proven, the judgment will not be arrested. (*Illinois Central Railroad Co. v. Simmons*, 38 Ill. 242; *Pennsylvania Co. v. Ellett*, 132 id. 654; *Lake Street Elevated Railroad Co. v. Burgess*, 200 id. 628.) The court properly denied the motion to arrest the judgment.

We think the court erred in permitting appellee to prove the conditions which existed after the suit was commenced, and that damages resulted from thence up to and until the time of the trial. It appeared from the proofs that during the months of February and March, 1900, the appellant company placed the objectionable matter, called "soap stock," on a city lot belonging to it and which adjoined the appellee's home on the west. She instituted the action on the 10th day of April of the same year. The cause came on for hearing before a jury on the 19th day of November, 1902. The court held, over the objection of the appellant, that the appellee

could lawfully show that the offensive odors arising from the soap stock after the institution of the suit infected the air in her house and nauseated and sickened herself and her family and rendered her home uncomfortable and unhealthy. A number of witnesses were permitted, under this ruling, to testify as to the condition of the soap stock, in warmer and colder weather, after the institution of the suit; that it was more offensive during the summer months and less noticeable during cooler weather. The appellee did not attempt to prove that she had suffered damages in the way of the depreciation in the value of her property, but based her right to recover on the insistence that the soap stock polluted or filled the atmosphere of her home with offensive and sickening odors, which injuriously affected her health and rendered her home less enjoyable and useful than it otherwise would have been. The nuisance was temporary in character. The evidence showed that the soap stock was removed from the lot of appellant on September 22, 1900, and the nuisance thereby abated. Much of the proof related to the inconvenience and discomfort to appellee and her family occasioned by the conditions which prevailed after the institution of the suit and until the soap stock was taken away from the lot.

The view of counsel for the appellee is, that, notwithstanding the fact the nuisance was temporary in its nature, as the soap stock was all placed upon the lot before the commencement of the suit, any injury which was occasioned by the effluvia arising therefrom after the institution of the suit was recoverable in the action. We do not so understand the rule to be. Whether recovery should have been confined to such damages as have been sustained at the time the action was brought or whether future damages might also be recovered depended on whether the nuisance was permanent or temporary in character. If permanent, all damages, past,

present and future, may be proven and recovered. If temporary, only such damages can be recovered as have accrued up to the time of bringing the action. *Schlitz Brewing Co. v. Compton*, 142 Ill. 511; *City of Centralia v. Wright*, 156 id. 561; 8 Am. & Eng. Ency. of Law, (2d ed.) 680, 685.

Counsel for the appellee urge that this court in *Chicago and Northwestern Railway Co. v. Hoag*, 90 Ill. 339, announced and enforced the rule that any injury suffered after the commencement of the action, but which arose from or was occasioned by a nuisance which was created before the commencement of the suit, could be proven and recovered for in the action. In the *Hoag* case the railway company wrongfully turned its waste water from a tank on to the premises of the plaintiff, where it spread and froze, and at the time of the commencement of the suit covered the plaintiff's premises with ice. After the institution of the suit the ice melted and rendered the premises slippery and muddy, which greatly inconvenienced the plaintiff and was detrimental to him in the transaction of his business on his premises, and this he was allowed to prove. In that case the water, which constituted the nuisance, congealed into ice and was on the plaintiff's premises when the suit was begun, and it was properly held that the damages which were occasioned by the melting of the ice after the institution of the suit were recoverable in the action, for the reason the railway company had created a nuisance on the premises of the plaintiff which was removed by the action of the forces of nature after the institution of the suit, and in that manner damages were occasioned. In the case at bar the offensive matter from which the odors arose was not upon the plaintiff's premises. The injury was occasioned by the stench which came to her premises from the offensive matter, and the right of recovery should have been restricted to the injuries occasioned by the

noxious odors which permeated the atmosphere of her home and premises before the commencement of the suit.

In *Schlitz Brewing Co. v. Compton*, *supra*, the brewing company had so negligently and improperly constructed the roof and eave-trough of its building that when rains fell the water flowed from the roof of the building against the wall of the plaintiff's building and into the windows of the cellar of the plaintiff's building. The trial court permitted the plaintiff to prove injuries occasioned to her property by water which fell upon the roof of the brewing company's building after the beginning of the suit and flowed from thence to and against the wall of plaintiff's building and into her windows and cellar. We held in that case that the alleged nuisance was the casting of water on plaintiff's premises from the roof of the brewing company's building, which stood upon the land of the brewing company; that the nuisance might be removed by correcting defects in the construction or hanging of the eave-trough; that the nuisance was therefore temporary in character, and that the plaintiff could not be allowed to prove that water was cast upon her premises after the institution of the suit and her property damaged thereby. In that case the roof and defective eave-trough had been constructed before the beginning of the suit and remained in the same condition after the institution of the suit, but it was not permanent in character, and consequently recovery for injuries occasioned by rain storms after the institution of the suit was held not allowable in the action. So in the case at bar, the offensive matter was placed upon a lot belonging to the appellant company. It created a nuisance which was temporary in character. The injury to the appellee was caused by the stench which arose from offensive matter on the premises of the appellant company and were carried in the air into and upon her property. Her action was to recover the damages occasioned by the tem-

porary befouling of the atmosphere of her home, and her recovery should have been restricted to such injuries as had been occasioned when her action was begun. The nuisance was temporary in its character, and when such is the case the injured party may have successive actions for the recovery of damages until the nuisance is abated, but cannot recover for injury sustained after the institution of the suit.

The judgment of the Appellate Court and that of the circuit court are each reversed, and the cause will be remanded to the circuit court for further proceedings consistent with the views here expressed.

Reversed and remanded.

Subsequently, on consideration of the case upon rehearing, the following additional opinion was filed:

PER CURIAM: Since the rehearing was granted in this case, we have given further consideration to the questions involved, and entertain the same views as those expressed in the foregoing opinion. Said opinion is accordingly re-adopted, and it is ordered that the same be re-filed, and that the judgment of reversal and remandment heretofore entered herein be re-entered as the judgment of this court.

INDEX.

ACTIONS AND DEFENSES.

	PAGE.
in a proceeding to remove cloud on title the proof must show possession by complainant or vacancy of premises at the time the bill was filed.....	22
admitting alleged abstracts of title in evidence, in a proceeding to register title, without any proper preliminary proof, is error.....	81
applicant for registration of title is not required to prove invalidity of defendant's tax deeds.....	81
legality of organization of a drainage district cannot be questioned in a proceeding by the district to condemn land for a ditch.....	83
a drainage district organized under the Levee act may acquire land by condemnation for construction of ditches across the lands of others.....	83
tender, after suit begun to foreclose a trust deed providing for a solicitor's fee, must include the solicitor's fee and must be kept good.....	99
administratrix who cannot carry out deceased's contract of sale because heirs will not join in deed may file a bill against them for specific performance.....	104
when defense of Statute of Frauds cannot be raised by demurrer.....	104
what not necessary in order to maintain action of deceit to recover amount of encumbrance on land falsely represented to be unencumbered.....	134
when estate is liable for assessment on stock of national bank which has become insolvent.....	178
statute limiting time for filing claims against estate does not apply to an assessment on the stock of an insolvent national bank.....	178
objection of adequate remedy at law must be raised below by demurrer or answer to the bill.....	178
when bank should interpose defense of illegal consideration in suit by endorsee of certificate of deposit.....	261
courts will not aid in enforcing illegal contract.....	261

ACTIONS AND DEFENSES.—*Continued.*

PAGE.

courts will not enforce foreign contract against the laws or public policy of this State, although it is lawful in the State where it was made.....	261
effect upon plaintiff's damages in a personal injury case where physician used improper treatment or the injury developed an organic tendency to disease.....	274
when circuit court may award <i>certiorari</i>	302
bill to contest will can be maintained only under the provisions of section 7 of the Statute of Wills.....	332
statute in force at the time bill to contest will is filed governs the question of whether the bill is filed within the time allowed by law.....	332
party has no vested right to have statute regulating time for filing bill to contest will remain unchanged after the will is probated.....	333
release of damages obtained by fraud is void, and the consideration need not be returned nor the release canceled in equity before suing at law for damages.....	341
a city is liable to land owner for damages occasioned by wrongful delay in bringing a condemnation suit to trial and in electing to abandon proceeding after judgment..	360
when a city is estopped to claim that party suing for damages for wrongful delay in bringing condemnation suit to trial should have applied to court for speedy trial....	361
defense of <i>laches</i> need not be set up in answer if <i>laches</i> is apparent from face of bill.....	404
former adjudication cannot be availed of unless pleaded..	404
judgment organizing drainage district, even though erroneous, cannot be set aside on <i>quo warranto</i> if the court had jurisdiction of the subject matter and the parties...	421
what does not bar petition to set aside probate of will....	438
<i>laches</i> cannot be imputed to wife for failure to assert her inchoate right to dower during her husband's lifetime, since such right is a mere expectancy.....	498
foreclosure proceeding is not strictly a proceeding <i>in rem</i> , since the decree is not binding upon persons not parties to the suit.....	498
when recovery of rent may be had on common counts...	523
what does not excuse liability for rent.....	523
whether the acts of the landlord amount to an eviction is a question of fact.....	523
what is a sufficient averment, in declaration for nuisance, that noxious odors came upon the plaintiff's premises...	636
in case of a temporary nuisance, only damages sustained before suit are recoverable.....	636

ADMINISTRATION.—See EXECUTORS AND ADMINISTRATORS.

AFFIDAVITS.

PAGE.

the Supreme Court cannot consider affidavit to determine whether a person is so prejudiced by a judgment as to entitle him to resist dismissal of writ of error..... 328

AGENCY.—See PRINCIPAL AND AGENT; BROKERS.

AMENDMENTS.

if statute has not, in fact, been complied with in levying a town tax, the tax cannot be validated by amendments on application for judgment of sale..... 174
when refusal to allow amendment of bill is error..... 239

APPEALS AND ERRORS.

when instruction in condemnation as to danger from fire, being an element of damage, is not prejudicial..... 26
if instructions for both parties in condemnation assume that lands not taken will be damaged, neither can complain of such assumption..... 26
in the absence of a complete record in a chancery case no presumption of error obtains..... 53
it is the duty of appellant or plaintiff in error in a chancery case to bring up all the evidence that has been preserved in the record..... 53
in case of partial reversal the costs may be apportioned by the reviewing court, in its discretion..... 53
under section 67 of Practice act it is error to require an appeal bond to be filed within five days..... 53
appeal from final order in building and loan receivership is governed by section 67 of Practice act..... 53
order sustaining demurrer to bill is not a final order from which an appeal will lie..... 59
recital in appeal bond that complainant's bill was dismissed does not show that decree dismissing bill was entered... 59
Supreme Court may look into entire record to determine whether the verdict is sufficiently certain to support the judgment..... 67
when verdict will be held to be sufficiently certain..... 67
when judgment against plaintiff for costs is not a final, appealable judgment..... 70
overruling of a challenge to array must be prejudicial in order to work reversal..... 72

APPEALS AND ERRORS.—*Continued.*

PAGE.

when instruction as to credibility of witness is erroneous..	83
instruction requiring jury to acquit accused unless the evidence "generates a full belief of his guilt," is properly refused.....	114
when failure of a jury to return into court an instruction given after retirement will not reverse.....	114
one cannot complain, on appeal, that a fact was not proved if proper proof thereof was prevented by his objection..	134
when freehold is not involved.....	141
instructions in a criminal case which are not based on the evidence, or which are misleading, useless or confusing, should not be given.....	143
when instruction as to duty of jury in considering evidence in criminal case is erroneous.....	143
instruction permitting jury to fix punishment for crime of manslaughter is erroneous.....	143
when decree is erroneous in ordering administrator to turn over personal assets in his hands.....	160
Supreme Court's approval of an instruction is merely a decision that the instruction is not subject to the particular objection urged against it.....	170
when instruction as to future damages in personal injury case is not objectionable.....	170
upon demurrer to the evidence the evidence most favorable to complainant must be taken as true.....	239
when refusal to allow amendment is error.....	239
it is not error to refuse repetition of given instruction....	252
when refusal of instruction that if the jury find plaintiff is not entitled to recover they need not consider the nature or extent of his injuries is not reversible error....	252
filing separate briefs by different attorneys for the same party is in violation of rule 15 of Supreme Court.....	262
only question on appeal from board of review is whether the property is subject to taxation, and not whether it was correctly valued.....	283
statements of prosecuting attorney derogatory to accused are not ground for reversal if based upon the facts established by the evidence.....	287
admitting in evidence in a will contest the endorsement of the probate judge on the will showing it was proved and admitted to probate is error.....	291
allegations of bill that will in contest was probated do not cure error in admitting order of probate.....	291
error in admitting order of probate in will contest is not cured by an instruction to disregard it.....	291

APPEALS AND ERRORS.—*Continued.*

PAGE.

when instructions for proponent in will contest are erroneous in isolating the facts and stating that each fact alone is not sufficient to overthrow will.....	292
when instruction as to disregarding false testimony is erroneous.....	292
requesting peremptory instruction presents question of law.	307
exception to refusal of peremptory instruction not waived by presenting general instructions on the facts.....	307
if a plea of the Statute of Limitations does not present a defense to all of the counts it is not error to sustain a demurrer thereto.....	307
when proceeding to cancel a tax sale certificate and any deed issued thereon involves a freehold.....	325
alleged error in canceling tax sale certificate after deed has been issued thereon is harmless, where the deed itself was properly canceled also.....	325
right to writ of error must appear from the record.....	328
plaintiff in error has the same right to dismiss a writ sued out in his name as to dismiss a suit begun by him in a court of original jurisdiction.....	328
Supreme Court cannot hear extrinsic evidence to determine whether person is so prejudiced by a judgment as to entitle him to resist dismissal of a writ of error....	328
when alleged error in refusing instructions is waived....	341
when grounds urged for reversal present no question of law.....	358
if Appellate Court decides issues on merits and remands with directions to proceed in conformity with the opinion, trial court can only enter final judgment without re-trial.	397
resort to Appellate Court's opinion may be had in order to determine whether it has decided issues on merits.....	397
when judgment of Appellate Court is final.....	397
when alleged error as to master's findings cannot be considered by Supreme Court on appeal.....	414
rehearing can only be asked on case as first made, and not upon an unabstracted additional record not called to the attention of the court on the hearing.....	424
if evidence of benefits in special assessment is heard in open court and is conflicting, the finding below will be upheld unless there is manifest error.....	453
court will not consider questions, on agreement of parties, which are not properly preserved for review.....	472
refusal to permit witness to state that car was not crowded is not error if the jury are fully advised as to all the facts of the matter.....	545

APPEALS AND ERRORS.—*Continued.*

PAGE.

- when party is estopped, on appeal, to urge that appellants' right to appeal does not appear from recitals of decree... 472
- when receivers of insolvent foreign corporation may sue out a writ of error in name of the corporation..... 561
- when Supreme Court must affirm..... 596
- fact that judge from whom a change of venue was taken afterwards reviews the case as a judge of the Appellate Court is not ground for reversal..... 625
- when instruction as to form of verdict does not authorize jury to find whatever damages they choose..... 631
- party cannot predicate error on failure to give an instruction upon the measure of damages where no instruction on the subject was requested..... 631
- mere assertion a constitutional question is involved is not sufficient to authorize Supreme Court to take jurisdiction 633
- when constitutional question is not open to review..... 633

ASSESSMENT FOR TAXATION.—See TAXES.

ATTESTATION.—See WILLS.

ATTORNEYS AT LAW.—See SOLICITORS' FEES.

- it is not a matter of right, but of sound discretion with the trial court, whether a private attorney may assist State's attorney in criminal case..... 142

BANKS.

- when estate is liable for assessment on stock of national bank which has become insolvent..... 178
- statute limiting time for filing claims against estate does not apply to an assessment on the stock of an insolvent national bank..... 178
- when bank should interpose defense of illegal consideration in suit by endorsee of certificate of deposit..... 261

BASTARDS.—See ILLEGITIMATES.

BENEFIT SOCIETIES.

- unexplained absence of a person from his usual place of abode for seven continuous years, nothing being heard of him during that time, raises a presumption of his death. 9

BILLS AND NOTES.

- endorsement of a certificate of deposit is void if the consideration is an agreement to share the profits made by using the proceeds to gamble on horse races..... 261

BILLS AND NOTES.—Continued. **PAGE.**

- when bank should interpose defense of illegal consideration in suit by endorsee of certificate of deposit..... 261
- a municipal warrant issued against a special assessment fund is not strictly a negotiable instrument..... 473
- effect where partnership property, which is disposed of in fraud of partnership, consists of negotiable paper..... 473

BOARD OF ASSESSORS.—See TAXES.

- board of assessors need not view property it assesses..... 256
- township assessor in Cook county is merely a deputy to the board of assessors, and his assessments are subject to review by the board..... 256

BOARDS OF REVIEW.

- only question for decision on appeal from board of review is whether the property is subject to taxation, and not whether it was correctly valued..... 283
- presumption is in favor of legality of assessment by board of review, and one seeking to overthrow it must show affirmatively sufficient grounds for doing so..... 283
- effect where mining rights are assessed, after severance, to the purchaser, although the land, including minerals, was assessed for full value to the owner..... 283
- the board of review has no power to review assessment of credits for previous years and increase the same under the guise of assessing omitted property..... 614
- under-valuation of property is not, of itself, evidence of fraud..... 614
- board of review has no power to take action after returning books to county clerk..... 614
- when assessment of omitted property is void..... 614

BONDS.

- section 7 of Administration act, requiring additional bond when executor sells land, does not apply to a sale by the executor, as trustee, under direction of the will..... 238

BRIEFS.

- filing separate briefs by different attorneys for the same party is in violation of rule 15 of Supreme Court..... 262

BROKERS.

- when "bought and sold notes" establish a contract..... 561
- an immaterial variance between "bought" and "sold" notes does not vitiate the contract..... 562

BROKERS.—*Continued.*

PAGE.

what is not a material variance between bought and sold notes evidencing a contract.....	562
bought and sold notes are construed as one instrument....	562
one employing broker to act in a particular market is regarded as intending the business will be done according to the usages and customs of the market.....	562
when broker's contract will be treated as ratified.....	562

BURDEN OF PROOF.—See EVIDENCE.

CARRIERS.—See RAILROADS.

CASES CONTROLLED BY OTHERS.—See FORMER CASES.

<i>People v. I., I. & I. R. R. Co.</i> 206 Ill. 612, and <i>C., I. & W. Ry. Co. v. People</i> , (<i>ante</i> , p. 197,) control the decision in <i>People v. C., B. & Q. R. R. Co.</i>	225
<i>Gage v. People</i> , (<i>ante</i> , p. 347,) controls the decision in <i>Gage v. People</i>	457
<i>C., B. & Q. R. R. Co. v. People</i> , (<i>ante</i> , p. 458,) controls the decision in <i>C. & E. I. R. R. Co. v. People</i>	497
<i>C., B. & Q. R. R. Co. v. People</i> , (<i>ante</i> , p. 458,) controls the decision in <i>Wabash R. R. Co. v. People</i>	522

CERTIFICATES OF DEPOSIT.—See BILLS AND NOTES.

CERTIORARI.

when circuit court may award <i>certiorari</i>	302
statutory provision that decision of the county court to call a county seat election is final is equivalent to a denial of right of appeal.....	302

CHANCERY.—See EQUITY.

CHANGE OF VENUE.

fact that judge from whom a change of venue was taken afterwards reviewed case as a judge of the Appellate Court is not ground for reversal.....	625
--	-----

CITIES.—See MUNICIPAL CORPORATIONS.

CLOUD ON TITLE.

warranty deed to the complainant is not sufficient proof of title, in bill to remove cloud, if there is no proof of possession by the complainant or his grantor.....	22
in a proceeding to remove a cloud the proof must show possession by complainant or vacancy of premises at the time the bill was filed.....	22

COLOR OF TITLE.	PAGE.
what cannot be relied upon as color of title.....	228
COMMERCIAL PAPER.—See BILLS AND NOTES.	
COMMISSION MEN.—See BROKERS.	
CONDEMNATION.—See EMINENT DOMAIN.	
CONFESSION OF JUDGMENT.	
authority to confess judgment must be strictly pursued, and if there is no power to enter debtor's appearance and confess judgment the judgment is a nullity.....	370
judgment by confession must be for a fixed sum.....	370
power to confess judgment for rent accruing under written lease cannot be extended to the implied contract result- ing from the tenant's holding over.....	371
CONFESSIONS.	
in prosecution for rape without force, the age of accused, being part of the <i>corpus delicti</i> , cannot be proved by his written confession.....	73
CONFLICT OF LAWS.	
domicile of father at time of birth of child does not control its right to inherit in other States.....	208
section 3 of Statute of Descent, respecting legitimating of child, controls its right to inherit in this State regardless of its right in other States.....	208
courts will not enforce foreign contract against the laws or the public policy of this State although it is lawful in the State where it was made.....	261
CONSERVATORS.	
amendment of 1895 to section 9 of act relating to lunatics, drunkards, etc., is not unconstitutional.....	598
under amendment of 1895 to section 9 of the act relating to lunatics, drunkards, etc., a conservator may administer estate of deceased ward as against next of kin.....	598
CONSIDERATION.—See DEEDS; BILLS AND NOTES.	
CONSTITUTIONAL LAW.	
section 2 of Statute of Wills, concerning subscribing wit- nesses and the effect of their testimony, is not unconsti- tutional, as delegating judicial power to them.....	428

CONSTITUTIONAL LAW.— <i>Continued.</i>	PAGE.
Statute of Wills, in limiting evidence of mental capacity on probate and on appeal to circuit court to the testimony of subscribing witnesses, is not unconstitutional..	428
sections 42 and 86 of Local Improvement act, fixing rate of interest on deferred installments and bonds, are not unconstitutional, as precluding a lower rate of interest..	452
act of 1901, in so far as it requires valuation fixed by State board to be used in determining maximum amount of tax to be raised, is not unconstitutional.....	458
acts of May 9, 1901, and May 10, 1901, respecting levy and extension of taxes, do not prescribe a limit on taxation..	458
amendment of 1895 to section 9 of act relating to lunatics, drunkards, etc., is not unconstitutional, as embracing a subject not expressed in the title of the act.....	598

CONSTRUCTION.

of ordinance granting right to lay railroad tracks in street, as not authorizing special assessment against the railroad company for paving street.....	47
testator's intent must prevail, if clearly conceived and not contrary to law, although the gift is not made in formal language.....	124
gift need not be in express words in order to have effect of disinheriting the heirs.....	124
in order to ascertain the testator's intention the court may look to the state of the property devised.....	124
court may supply words obviously omitted from will.....	124
when court may substitute "and" for "or".....	124
estate of trustee is commensurate with his powers.....	125
of section 6a of the State's Attorneys act of 1903, as not depriving court of power to permit an attorney paid by private parties to assist State's attorney in criminal case.	142
of language of will, as not passing title to bank stock but only the right to dividends for life.....	178
in construing a contract the court may look to the interpretation the parties have put upon it by their acts.....	190
of section 7 of Administration act, requiring an additional bond when executor sells land, as not applying to a sale by executor, as trustee, under direction of the will.....	238
of act of 1903, reducing time for filing bill to contest will to one year from the time of probate, as applying to wills previously probated.....	333
of section 2 of Statute of Wills, concerning subscribing witnesses and the effect of their testimony, as not unconstitutional.....	428

CONSTRUCTION.—*Continued.*

PAGE.

of certificate of publication, as being sufficient.....	410
of term "credible witness" in will, as meaning one who is legally competent to testify in court to the facts which he attests by subscribing his name to the will.....	428
of paragraph 5 of section 99 of Local Improvement act, as applying to assessments confirmed under prior acts although not made payable in installments.....	443
of sections 178 and 279 of Revenue act, as not applying to delinquent special assessment where the authorities have followed sections 61 to 67 of Local Improvement act...	443
of acts of May 9, 1901, and May 10, 1901, respecting taxes, as not prescribing a limit upon taxation.....	458
of will, as to when particular real estate passes under residuary clause and not under clause directing application of proceeds of sale of land.....	508
word "bequeath" may denote a gift of real estate.....	508
in case of doubt whether provision of lease is a covenant or condition, courts will construe it as a covenant.....	523
of a provision that lessor will put premises in a habitable condition for lessee by a certain date, as being an independent covenant.....	523
an express covenant upon a particular subject excludes the idea of a different implied covenant.....	523
of amendment of 1895 to section 9 of act relating to lunatics, drunkards, etc., as not being unconstitutional.....	598
when subsequent act repeals or creates an exception to a former act.....	598

CONTRACTS.

right of administratrix to carry out deceased's contract for sale of land by filing bill against heirs to compel them to specifically perform the agreement.....	104
it is not essential to the validity of a contract for sale of land made with agent of purchaser that the seller know the name of the purchaser.....	104
when defense of Statute of Frauds cannot be raised by demurrer.....	104
interpretation parties have put upon contract by their acts may be looked to by court when construing it.....	190
when additional service to lessee, not mentioned in lease but furnished by lessor, does not pass by implication upon execution of new lease.....	190
if contract to sell land shows the conveyance is to be made to two persons, conveyance of the entire title to one of them alone cannot be specifically enforced.....	249

CONTRACTS.—*Continued.*

PAGE

courts will not aid in enforcing a contract which is part of a gambling transaction, but will leave the party in the position he has placed himself.....	261
courts will not enforce a contract against the law or public policy of this State, even though the contract may be lawful in the State where it was made.....	261
purchaser of equity of redemption in encumbered property is not personally liable to pay the encumbrance unless he has expressly agreed to do so.....	389
when extending time of payment does not make grantee in deed to encumbered property personally liable to pay the encumbrance.....	389
persons dealing with partnership are required to take notice of the partnership, the identity of the partners, its business and the general course of the business.....	473
one knowingly aiding partner to defraud partnership can claim no benefit from the transaction.....	473
when transaction with partner is voidable.....	473
provision that lessor will cause premises to be put in habitable condition for lessee by a certain date is an independent covenant.....	523
covenant going to part, only, of the consideration is generally considered as independent.....	523
in case of doubt whether provision of lease is a covenant or a condition, the courts are inclined to construe it as a covenant.....	523
an express covenant upon a subject excludes the idea of a different implied one.....	523
mortgage does not create personal obligation if there is no promise to pay the debt, perform the contract or perform the act sought to be secured by the mortgage.....	549
what provision of mortgage of saloon fixtures to brewery company does not create a personal covenant which the mortgagee may enforce by injunction.....	549
when "bought and sold notes" establish a contract.....	561
an immaterial variance between "bought" and "sold" notes does not vitiate the contract.....	562
what is not a material variance between the bought and sold notes evidencing a contract.....	562
bought and sold notes are construed as one instrument...	562
effect of customs and usages of a particular market on a broker's contract evidenced by bought and sold notes...	562
when contract will be treated as ratified.....	562

CONVEYANCES.—See DEEDS; MORTGAGES.

CORPORATIONS.—See RAILROADS; MUNICIPAL CORPORATIONS.

	PAGE.
when estate is liable for assessment on stock of a national bank which has become insolvent.....	178
statute limiting time for filing claims against estate does not apply to an assessment on the stock of an insolvent national bank.....	178
extent to which shares of stock are subject to levy.....	351
when wife may assert title to shares of stock as against creditors of husband although the stock stands on the books in the husband's name.....	351
when receivers of insolvent foreign corporation may sue out a writ of error in name of the corporation.....	561

COSTS.

in case of partial reversal the costs may be apportioned by the reviewing court, in its discretion.....	53
refusal of a defendant in bill to cancel tax deed to accept sufficient tender renders him liable for the costs occasioned by his refusal.....	325

COUNTIES.—See TAXES.

COUNTY SEATS.

statutory provision that decision of county court to call a county seat election is final is equivalent to a denial of the right of appeal.....	302
when circuit court may award <i>certiorari</i>	302
signers of petition for county seat election may withdraw their names at any time before the county court has finally acted on the petition.....	302

COURTS.—See APPEALS AND ERRORS; EQUITY; JURISDICTION.

courts will not take judicial notice, as being a matter of common knowledge, that railroad right of way is fenced as the track is constructed.....	26
Supreme Court may look into entire record to determine whether the verdict is sufficiently certain to support the judgment.....	67
jurors in criminal court of Cook county may be transferred from one branch to another.....	72
previous to arraignment in a branch of the criminal court of Cook county the accused is entitled to a list of all the jurors serving in the various branches.....	73

COURTS.—*Continued.*

	PAGE.
correct practice where list of jurors in a particular branch of criminal court is exhausted.....	73
in determining the rights of the parties in specific performance the court cannot consider the wisdom of the law on which such rights are based.....	105
it is a matter resting in the sound discretion of the court whether an attorney paid by private parties may assist State's attorney in a criminal case.....	142
Supreme Court's approval of an instruction is merely a decision that the instruction is not subject to the particular objection urged against it.....	170
courts will not aid in enforcing illegal contract.....	261
courts will not enforce foreign contract in violation of the laws or public policy of this State although it is lawful in the State where it was made.....	261
filing separate briefs by different attorneys for the same party is against rule 15 of Supreme Court.....	262
one county judge may hear legal objections to special assessment and another may try the question of benefits..	268
Supreme Court will take judicial notice of the names of the various county judges of the State.....	269
when circuit court may award <i>certiorari</i>	302
it is improper practice to permit counsel for a city to make up a trial calendar of the city's condemnation cases to suit his own convenience.....	361
if Appellate Court decides issues on merits and remands with directions to proceed in conformity with opinion, trial court can only enter final judgment without re-trial.	397
resort to Appellate Court's opinion may be had to determine whether that court has decided the issues involved on their merits.....	397
when judgment of Appellate Court is final.....	397
what order of court amounts to such restraint upon issuing execution as excludes the period of delay from the one year's life of the lien of the judgment.....	397
when Supreme Court must affirm.....	596

COVENANTS.—See CONTRACTS.

CREDITORS' BILLS.—See DEBTOR AND CREDITOR.

clear proof is required to sustain conveyance from husband to wife where rights of creditors are involved.....	36
when wife cannot claim property to the exclusion of creditors of her husband.....	36

CRIMINAL LAW.

	PAGE.
jurors in criminal court of Cook county may be transferred from one branch to another.....	72
overruling challenge to array must be prejudicial to reverse.	72
previous to arraignment in a branch of the criminal court of Cook county the accused is entitled to a list of all the jurors in the various branches.....	73
correct practice where list of jurors in particular branch of criminal court is exhausted.....	73
what must be shown to prove rape without force.....	73
in prosecution for rape without force, the age of accused, being part of the <i>corpus delicti</i> , cannot be proven by his written confession.....	73
in prosecution for rape without force the jury cannot fix the age of the accused by mere inspection of his person, without any proof.....	73
when confession is properly allowed to go to jury.....	114
presumption of innocence does not mean that one who has collected and kept his employer's money is innocent of any intent to defraud him.....	114
instruction requiring jury to acquit accused unless the evidence "generates a full belief of his guilt" is properly refused.....	114
when failure of jury to return into court an instruction given after retirement will not reverse.....	114
it is not a matter of right for a private attorney to assist prosecution, but the court may, in its discretion, permit such course in interest of justice.....	142
section 6a of act of 1903, relating to State's attorneys, does not preclude court from allowing attorneys paid by private parties to assist in prosecution.....	142
when homicide in defense of habitation is justified.....	142
one may, within his own house, use all needful force to keep an aggressor out, even to taking his life.....	143
peril of life or great bodily harm not essential in order to justify taking life in defense of habitation.....	143
instructions in a criminal case which are not based on the evidence, or are misleading, useless, irrelevant or confusing, should not be given.....	143
jury should not fix punishment for manslaughter.....	143
statements of prosecuting attorney derogatory to accused are not ground for reversal if based upon the facts as shown by the evidence.....	287

CUSTOMS.—See USAGES.

DAMAGES.

PAGE.

damages attendant upon leaving right of way unfenced for six months after completion of road may be considered by jury on condemnation of right of way.....	26
damages in condemnation of right of way may be estimated with reference to any motive power the petitioner may elect to use under its charter.....	26
when instruction in condemnation as to danger from fire being an element of damage is not prejudicial.....	26
proof of value of land is proper, in an action of deceit for falsely representing land to be unencumbered, as an aid to measuring the damages.....	134
plaintiff in personal injury case may recover all damages, present or prospective, which necessarily result from the injury.....	170
future pain and suffering and inability to labor are part of the prospective damages recoverable.....	170
to justify assessment of prospective damages the evidence must show that the plaintiff is reasonably certain to suffer such damages and the nature and extent thereof....	170
when instruction as to future damages in personal injury case is not objectionable.....	170
when question of future damages, where plaintiff has not recovered from her injuries, is properly left to jury....	171
what are proper elements of damage which jury may consider in correcting drainage assessment roll.....	186
in proving damages for impairment of ability to labor, the proper inquiry is the comparative capacity of plaintiff to earn money at time of and after the injury.....	220
proof of capacity of plaintiff to earn money when he was younger and in a different employment is too remote and uncertain to be competent.....	220
effect upon plaintiff's damages in a personal injury case where physician used improper treatment or the injury developed organic tendency to disease.....	274
a city is liable to a land owner for damage occasioned by wrongful delay in bringing a condemnation suit to trial and in electing to abandon proceeding after judgment...	360
the owner of the land at the time of the wrongful delay is the person entitled to recover damages.....	360
when defendant in condemnation cannot recover expense of defending abandoned suit as part of the damages occasioned by the wrongful delay of petitioner.....	361
in case of temporary nuisance, only damages sustained before suit may be recovered.....	636

DEBTOR AND CREDITOR.

PAGE.

clear proof is required to sustain conveyance from husband to wife where rights of creditors are involved.....	36
when wife cannot claim property to the exclusion of creditors of her husband.....	36
extent to which shares of stock are subject to levy.....	35
when wife may assert title to shares of stock as against creditors of her husband although the stock stands on the books in her husband's name.....	351
homestead estate does not pass by deed not joined in by wife even though the deed is to the wife.....	488
value of homestead estate is a fixed quantity, which does not change with the value of the homestead premises...	488
creditors cannot compel the widow to claim her award for their benefit nor can they assert the claim for her.....	488
when grantee is not entitled to protection against judgment creditor of grantor to the extent of the consideration paid for the property.....	625

DECEIT.—See FRAUD.

DECLARATIONS.—See EVIDENCE.

DECREES.—See JUDGMENTS AND DECREES.

DEEDS.—See TAX DEEDS.

a warranty deed to complainant in bill to remove cloud is not sufficient proof of title, there being no proof of possession by the complainant or his grantor.....	22
clear proof is required to sustain conveyance from husband to wife where rights of creditors are involved.....	36
a deed acquired by an abuse of fiduciary relation, in which the grantee was the dominant party, will be set aside in equity.....	160
children of grantor cannot avoid his deed by showing that he acted fraudulently.....	228
services rendered by grantee in keeping house for grantor and caring for his children constitute a legal consideration for a deed.....	228
a conveyance shortly before grantor's marriage is not in fraud of rights of prospective wife if it was based upon a fair consideration.....	228
a voluntary conveyance by parent to child shortly prior to grantor's re-marriage is not necessarily in fraud of the dower rights of the prospective wife.....	228
what cannot be relied upon as color of title.....	228

DEEDS.—*Continued.*

PAGE.

purchaser of equity of redemption in encumbered property is not personally liable to pay the encumbrance unless he has expressly agreed to do so.....	389
when extending time of payment does not make grantee in deed to encumbered property personally liable to pay the encumbrance.....	389
if a child is the dominant party to a fiduciary relation between himself and parent, a deed from latter to child for inadequate consideration is presumed unfair.....	507
when deed will be set aside for undue influence.....	507
when party is estopped to urge lack of proof to support a finding that her deed was acquired <i>pendente lite</i>	508
when grantee is not entitled to protection against a judgment creditor of grantor to the extent of the consideration paid for the property.....	625

DEFENSES.—See ACTIONS AND DEFENSES.

DEFINITIONS.

a "credible witness" to a will is one who is legally competent to testify in court to the facts which he attests by subscribing his name to the will.....	428
---	-----

DESCENT.

domicile of father at time of birth of child does not control its right to inherit in other States.....	208
law legitimating child for purposes of inheritance is a rule of property.....	208
section 3 of the Statute of Descent, respecting legitimating of child, controls its right to inherit in this State regardless of its rights in other States.....	208

DOWER.

<i>laches</i> cannot be imputed to wife for failure to assert her inchoate right of dower during her husband's lifetime, since such right is a mere expectancy.....	498
---	-----

DRAINAGE.

use of land for construction of drainage ditch by a district organized under the Levee act is a public use.....	83
drainage district organized under Levee act may acquire land by condemnation.....	83
legality of the organization of drainage district cannot be questioned in a proceeding by it to condemn land.....	83

DRAINAGE.—*Continued.*

PAGE.

- a *prima facie* case of benefits made by the assessment roll cannot prevail over clear proof that the assessment is grossly excessive..... 138
- assessment roll is *prima facie* evidence that the lands of the district will be benefited to the extent of the benefits assessed against them..... 186
- what are proper elements of damage to land owner which jury may consider when correcting drainage assessment. 186
- judgment organizing drainage district, even though erroneous, cannot be set aside on *quo warranto* if the court had jurisdiction of the subject matter and the parties.. 421

ELECTIONS.

- statutory provision that decision of county court to call a county seat election is final is equivalent to a denial of right of appeal..... 302
- when circuit court may award *certiorari*..... 302
- signers of petition for county seat election may withdraw their names at any time before the county court has finally acted on the petition..... 302

ELECTRIC COMPANIES.

- use of electricity for profit requires care in its use commensurate with the danger thereof..... 318
- when recovery for death of telephone lineman cannot be predicated upon alleged negligence of electric light company with respect to poor insulation of wires..... 318
- electric light company owes no duty to the public to give warning before turning on its current..... 318

EMBEZZLEMENT.

- when confession is properly allowed to go to jury..... 114
- presumption of innocence does not mean that one who has collected and kept his employer's money is innocent of any intent to defraud him..... 114

EMINENT DOMAIN.

- defendant in condemnation is not required to prove ownership..... 26
- petitioner desiring to question cross-petitioner's allegation of title must take issue..... 26
- question of ownership of land condemned is a preliminary one, which must be litigated and determined before the jury is empaneled to assess damages..... 26

EMINENT DOMAIN.—*Continued.*

PAGE.

damages attendant upon keeping right of way unfenced for six months after completing railroad may be considered by the jury in condemnation.....	26
defendant's damages may be estimated with reference to any motive power which the petitioner may elect to use under its charter.....	26
when instruction as to danger from fire being an element of damage in condemnation of right of way for railroad is not prejudicial.....	26
courts will not take judicial notice, as being a matter of common knowledge, that railroad right of way is fenced as the track is constructed.....	27
a public use may be local in extent.....	83
a use, in order to be public, must be controlled by law after the land is condemned for such use.....	83
use of land for construction of drainage ditch by a district organized under the Drainage and Levee act of 1879 is a public use.....	83
drainage district organized under Levee act may acquire land by condemnation.....	83
legality of the organization of drainage district cannot be questioned in a proceeding by it to condemn land.....	83
a city is liable for damage to a land owner occasioned by wrongful delay in bringing a condemnation suit to trial and in electing to abandon proceeding after judgment..	360
the owner of the land at the time of the wrongful delay is the person entitled to recover damages.....	360
when defendant in condemnation cannot recover expense of defending an abandoned suit as part of the damages occasioned by wrongful delay of petitioner.....	361

EQUITY.

tender, after suit begun to foreclose trust deed providing for a solicitor's fee, must include the solicitor's fee and must be kept good.....	99
amount of solicitor's fee, when fixed by the court in foreclosure, may be included in decree and draw interest...	99
master in chancery cannot arbitrarily fix his fees in a lump sum, without indicating the character and extent of his services.....	99
administratrix who cannot carry out deceased's contract of sale because heirs will not join in deed may file a bill against them for specific performance.....	104
filing demurrer without limiting appearance gives jurisdiction of the person.....	104

EQUITY.—*Continued.*

PAGE.

bill by an administratrix to compel heirs to carry out deceased's contract of sale need not allege that the sale is necessary to pay debts of the estate.....	104
in determining the rights of the parties in specific performance the court cannot consider the wisdom of the law upon which such rights are based.....	105
deed acquired by an abuse of a fiduciary relation, in which the grantee was the dominant party, will be set aside in equity.....	160
objection of adequate remedy at law must be raised below by demurrer or answer to the bill.....	178
if rights of minors are not involved equity cannot refuse partition where parties have brought themselves within the provisions of the statute.....	208
decreeing partition before estate is settled is not error....	208
if contract to sell land shows the conveyance is to be made to two persons, conveyance of the entire title to one of them alone cannot be specifically enforced.....	249
bill to contest will can be maintained only under the provisions of section 7 of the Statute of Wills.....	332
statute in force at time bill to contest will is filed governs the question of whether the bill is filed within the time allowed by law.....	332
a cross-complainant may dismiss cross-bill without prejudice before a decree dismissing it for want of equity is entered.....	338
court of equity will not set aside a decree upon the ground that it was obtained by false evidence.....	404
defense of <i>laches</i> need not be set up in answer if <i>laches</i> appears from face of bill.....	404
what constitutes <i>laches</i> in a given case is largely a matter of discretion with the chancellor.....	404
former adjudication cannot be availed of unless pleaded..	404
equity may enjoin collection of tax extended upon an assessment made by a body having no authority.....	609

ESTOPPEL,

if instructions for both parties assume same fact neither can complain of such assumption.....	26
when a city is estopped to claim that party suing for damages for wrongful delay in bringing a condemnation suit to trial should have applied to court for speedy trial....	361
when finding of master that party was estopped by contract cannot be considered on appeal.....	414

ESTOPPEL.—*Continued.*

PAGE.

when appellee is estopped to urge that appellant's right to appeal does not appear from recitals of the decree.....	472
when administrator cannot complain that he was not made a party in his representative capacity.....	488
when party is estopped to urge lack of proof to support the finding that her deed was acquired <i>pendente lite</i>	508

EVIDENCE.

the unexplained absence of person from his usual place of abode for seven continuous years, nothing being heard of him during that time, raises presumption of his death.	9
admission of incompetent evidence is harmless if the fact sought to be shown is fully established by competent evidence in the record.....	10
warranty deed to the complainant is not sufficient proof of title in a bill to remove a cloud, there being no proof of possession either of the complainant or his grantor.....	22
in a proceeding to remove a cloud on title the proof must show possession by complainant or vacancy of property at the time the bill was filed.....	22
defendant in condemnation is not required to prove ownership.....	26
damages attendant upon leaving right of way unfenced for six months after completion of road may be considered by the jury.....	26
damages in condemnation of a right of way may be estimated with reference to any motive power which the petitioner may elect to use under its charter.....	26
courts will not take judicial notice, as being a matter of common knowledge, that railroad right of way is fenced as the track is constructed.....	27
clear proof is required to sustain conveyance from husband to wife where rights of creditors are involved.....	36
what must be shown to prove rape without force.....	73
in prosecution for rape without force, the age of accused, being part of the <i>corpus delicti</i> , cannot be proven by his written confession.....	73
in prosecution for rape without force the jury cannot fix age of accused by inspection of his person, without any proof of actual or apparent age.....	73
admitting alleged abstracts of title in evidence, in proceeding to register title, without proper preliminary proof, is error.....	81
applicant for registration of title is not required to prove invalidity of defendant's tax deeds.....	81

EVIDENCE.—*Continued.*

PAGE.

when confession is properly allowed to go to jury.....	114
presumption of innocence does not mean that one who has collected and kept money of his employer is innocent of any intent to defraud him.....	114
proof of value of land is proper in an action for deceit in falsely representing land to be unencumbered.....	134
one cannot complain, on appeal, that fact was not proved if proper proof thereof was prevented by his objection..	134
<i>prima facie</i> case of benefits, made by assessment roll in a drainage case, cannot prevail over clear proof that the assessment is grossly excessive.....	138
it is essential to the admission of church records in evidence that it be shown the entries were made by the person authorized to make them.....	154
it is not presumed, in aid of an alleged common law marriage, that a subsequent ceremonial marriage was a bigamous one.....	154
when alleged statements tending to show a common law marriage are overcome by other proof.....	154
to justify assessment of prospective damages the evidence must show that plaintiff is reasonably certain to suffer such damages and the nature and extent thereof.....	170
when question of future damages is properly left to jury..	171
in proving damages for impairment of ability to labor, the proper inquiry is the comparative capacity of plaintiff to earn money at time of and after he received injury..	220
when proof of prior capacity of plaintiff to earn money is too remote and uncertain* to be competent.....	220
X-ray photographs are admissible in personal injury case after proper preliminary proof.....	220
jury may take photographs or skiographs, which have been given in evidence, to the jury room.....	220
when parties defendant may testify for co-defendant in a suit by widow and heirs to set aside deed.....	229
on demurrer to the evidence, the evidence most favorable to complainant must be taken as true.....	239
when refusal to allow amendment of bill is error.....	239
effect upon plaintiff's damages in a personal injury case where physician used improper treatment or the injury developed an organic tendency to disease.....	274
presumption is in favor of legality of assessment by board of review, and one seeking to overthrow it must affirmatively show sufficient grounds for doing so.....	283
burden of proof of undue influence where fiduciary relation existed between testator and devisee.....	291

EVIDENCE.—*Continued.*

PAGE.

admitting in evidence in a will contest the endorsement of the probate judge on the will showing it was proved and admitted to probate is error.....	291
what evidence tends to show negligence upon the part of a hoisting engineer at a coal mine.....	341
if there is evidence tending to show plaintiff's signature to release was obtained by fraud, the court cannot hold, as a matter of law, that the release bars the action.....	341
claim that incompetency of hearsay evidence was waived by counsel for the heirs in partition suit cannot be urged against the infant defendants.....	488
if a child is the dominant party to a fiduciary relation between himself and parent, a deed from latter to child for inadequate consideration will be presumed unfair.....	507
when transfer of personal property from parent to child will be held to be free from undue influence.....	508
refusal to permit witness to state that car was not crowded is not error if the jury are in possession of the facts as to such condition.....	545
confirmation judgment is <i>prima facie</i> an adjudication of benefits.....	620

EXECUTIONS.

extent to which shares of stock are subject to levy.....	351
when a wife may assert title to shares of stock as against creditors of husband though stock stands on the books in the husband's name.....	351
what order of court amounts to such restraint on issuing execution as excludes the period of delay from the one-year's life of the lien of the judgment.....	397

EXECUTORS AND ADMINISTRATORS.

joining widow personally and in her capacity as administratrix, in bill for specific performance against heirs, is not a misjoinder of parties.....	104
administratrix who is unable to carry out deceased's contract for sale of land because heirs will not join in deed may file a bill against them for specific performance..	104
section 4 of Contracts act construed as not requiring notice to heirs of application by an administratrix for order of court to carry out deceased's contract of sale.....	104
bill by an administratrix against heirs to compel them to carry out deceased's contract of sale need not allege that a sale is necessary to pay debts of estate.....	104

EXECUTORS AND ADMINISTRATORS.—*Continued.* PAGE.

when decree is erroneous in ordering administrator to turn over personal assets in his hands.....	160
sale by executor in his capacity as trustee does not require a separate bond if none is required by the will.....	238
section 7 of the Administration act, respecting additional bond, does not apply to a sale by an executor when acting in his capacity as trustee.....	238
when administrator cannot complain that he was not made a party in his representative capacity.....	488
amendment of 1895 to section 9 of act relating to lunatics, drunkards, etc., is not unconstitutional, as embracing a subject not expressed in the title of the act.....	598
a conservator may administer estate of deceased ward as against next of kin.....	598
when an estate is regarded as intestate as respects appointment of a personal representative.....	598

FEES AND SALARIES.

amount of solicitor's fee, when fixed by court in foreclosure, may be included in the decree and draw interest..	99
master in chancery cannot arbitrarily fix his fee in a lump sum, without indicating the character and extent of his services.....	99

FIDUCIARY RELATIONS.—See PARENT AND CHILD.

a deed acquired by abuse of a fiduciary relation, in which the grantee was the dominant party, will be set aside in equity.....	160
---	-----

FORECLOSURE.—See MORTGAGES.

FORMER ADJUDICATION.—See RES JUDICATA.

FORMER CASES.

<i>Chicago v. Noonan</i> , 210 Ill. 18, adhered to, as to deficiency for which a supplemental assessment may be levied not being ascertainable before contract is performed.....	96
<i>C., I. & W. Ry. Co. v. People</i> , 212 Ill. 518, followed, as to its not being necessary for certificate of levy of road tax to state the amount required for each purpose.....	198, 174
<i>People v. Latham</i> , 203 Ill. 9, followed, as to when an ordinance for building sidewalk by special tax is invalid..	184
<i>Thomas v. Wiggers</i> , 41 Ill. 470, distinguished, as to when additional service to lessee does not pass, by implication, upon execution of new lease.....	190

FORMER CASES.—*Continued.*

PAGE.

- Mix v. People*, 72 Ill. 241, and *C. & A. R. R. Co. v. People*, 155 id. 276, distinguished, as to what is not a sufficient levy of county tax..... 197
- language in *Consolidated Coal Co. v. Haenni*, 146 Ill. 614, and *Chicago Terminal Transfer R. R. Co. v. Schmelling*, 197 id. 619, criticised, as to waiver of error in refusing peremptory instruction..... 307
- Gage v. Busse*, 94 Ill. 570, distinguished, as to when freehold is involved in suit to cancel tax sale certificate.... 325
- McChesney v. People*, 174 Ill. 46, distinguished, as to construction put upon certificate of publication... 410
- Burton Stock Car Co. v. Traeger*, 187 Ill. 9, and *Grant Land Ass. v. People*, 213 id. 256, adhered to, as to right of Cook county board of assessors to make original assessments..... 609
- McChesney v. Chicago*, 188 Ill. 423, and *Chicago v. Noonan*, 210 id. 18, followed, and distinguished from *Cody v. Cicero*, 203 id. 322, as to confirmation judgment being *prima facie* an adjudication of benefits..... 620

FRATERNAL INSURANCE.—See BENEFIT SOCIETIES.

FRAUD.—See STATUTE OF FRAUDS.

- what is not necessary in order to maintain action for deceit to recover amount of encumbrance on land falsely represented to be unencumbered..... 134
- when principal is liable for agent's fraud..... 134
- proof of the value of land is proper in action for deceit in falsely representing land to be unencumbered..... 134
- deed acquired by an abuse of a fiduciary relation, in which grantee is the dominant party, will be set aside in equity. 160
- children of grantor cannot avoid his deed by showing that he acted fraudulently..... 228
- conveyance shortly before the grantor's marriage is not in fraud of rights of prospective wife if it is based upon a fair consideration..... 228
- voluntary conveyance by parent to child shortly before the grantor's re-marriage in not necessarily in fraud of the rights of the prospective wife..... 228
- release of damages obtained by fraud is void, and the consideration need not be returned nor the release canceled in equity before suing at law for damages..... 341
- persons dealing with partnership are required to take notice of the partnership, the identity of the partners, its business and the general course of its business..... 473

FRAUD.—*Continued.*

PAGE.

- a person knowingly aiding a partner to dispose of property in fraud of partnership can claim no benefit from the transaction..... 473
- when transaction with partner is voidable..... 473
- effect where property disposed of by partner in fraud of partnership consists of negotiable paper..... 473
- when deed obtained by undue influence will be set aside.. 507
- if child is the dominating party of a fiduciary relation between himself and parent, conveyance from the latter to child for inadequate consideration is presumed unfair... 507
- when transfer of personal property from parent to child will be held free from undue influence..... 508
- when grantee is not entitled to protection against a judgment creditor of grantor to the extent of the consideration paid for the property..... 625

FREEHOLD.

- when freehold is not involved..... 141
- when proceeding to cancel a tax sale certificate, and any deed issued thereon, involves a freehold..... 325

GAMING.

- endorsement of certificate of deposit is void if the consideration is an agreement to share profits made by using the proceeds to gamble on horse races..... 261
- when bank should interpose defense of illegal consideration in suit by endorsee of certificate of deposit..... 261
- what is a gambling transaction..... 261
- courts will not aid in enforcing a contract which is a part of a gambling transaction, but will leave the party in the position he has placed himself..... 261

HOMESTEAD.

- the test of homestead right is whether the person through whom the right is claimed had, at his death, an interest in the land which could have been sold on execution... 228
- wife acquires no homestead right in land held by husband as tenant at will..... 228
- homestead estate does not pass by deed not joined in by the wife even though deed is to wife..... 488
- heirs are entitled to partition unreleased homestead estate after abandonment by widow and children..... 488
- value of homestead estate is a fixed quantity, which does not change in proportion to the increase or decrease in value of the homestead property..... 488

HOMESTEAD.—*Continued.*

PAGE.

on partitioning an unreleased homestead estate, the value of the excess, if any, over the value of the homestead is determined as of the time partition is sought. 488

HOMICIDE.—See MURDER.

HUSBAND AND WIFE.—See HOMESTEAD.

clear proof is required to sustain conveyance from husband to wife where rights of creditors are involved. 36
 when wife cannot hold property to the exclusion of creditors of her husband. 36
 it is not presumed, in aid of an alleged common law marriage, that subsequent ceremonial marriage was bigamous 154
 wife acquires no homestead right in land held by husband as tenant at will. 228
 conveyance shortly before the grantor's marriage is not in fraud of rights of prospective wife if it was based upon fair consideration. 228
 voluntary conveyance from parent to child shortly before grantor's re-marriage is not necessarily in fraud of the rights of prospective wife. 228
 creditors of widow cannot compel her to claim her award for their benefit nor can they assert the claim for her. . 488
laches cannot be imputed to wife for a failure to assert an inchoate right of dower during husband's lifetime, since such right is a mere expectancy. 498

ILLEGAL CONTRACTS.—See CONTRACTS.

ILLEGITIMATES.

courts will not presume that marriage of one accused of bastardy was for the purpose of avoiding prosecution. . 208
 domicile of father at time of birth of child does not control its right to inherit in other States. 208
 law legitimating child for purposes of inheritance is a rule of property. 208
 section 3 of Statute of Descent, respecting legitimating of the child, controls the right of the child to inherit in this State regardless of its right in other States. 208

INJUNCTION.

what provision of mortgage of saloon fixtures to brewery company does not create a personal covenant which the mortgagee may enforce by injunction. 549
 equity may enjoin collection of tax extended upon an assessment made by a body having no authority. 609

INSOLVENCY.—See DEBTOR AND CREDITOR.

INSTRUCTIONS.

	PAGE.
when instruction concerning presumption of death is not erroneous, as representing it to be conclusive.....	9
when the omission of a requirement respecting continuous search for missing person before he will be presumed to be dead is not misleading.....	9
when an instruction as to "satisfactory evidence of death" which must be produced to insurance company before it is liable on policy is misleading.....	10
when instruction in condemnation as to danger from fire as an element of damage is not prejudicial.....	26
if instructions for both parties in condemnation assume that lands not taken are damaged, neither can complain of such assumption.....	26
when instruction as to credibility of witness is erroneous and prejudicial.....	83
instruction requiring jury to acquit accused unless the evidence "generates a full belief of his guilt" is properly refused.....	114
when failure of jury to return into court an instruction given after retirement will not reverse.....	114
instructions in a criminal case which are not based on the evidence, or which are misleading, useless, irrelevant or confusing, should not be given.....	143
when instruction as to duty of jury in considering evidence in criminal case is erroneous.....	143
instruction permitting jury to fix punishment for crime of manslaughter is erroneous.....	143
Supreme Court's approval of an instruction is only a decision that the instruction is not subject to the particular objection urged against it.....	170
when instruction as to allowance of future damages in a personal injury case is not objectionable.....	170
repetitions of instructions need not be given.....	252
when refusal of instruction that if the jury find plaintiff is not entitled to recover they need not consider the nature and extent of his injuries is not reversible error.....	252
error in admitting order of probate in will contest is not cured by instruction to disregard it.....	291
when instructions for proponent in will contest are erroneous in isolating the facts and stating that each fact alone is not sufficient to overthrow will.....	292
when instruction as to disregarding false testimony is erroneous.....	292

INSTRUCTIONS.—*Continued.*

PAGE.

- when instruction as to form of verdict does not authorize jury to find whatever damages they choose..... 631
- party cannot predicate error on failure to give an instruction upon the measure of damages where no instruction on the subject was requested..... 631

INSURANCE.

- unexplained absence of a person from his usual place of abode for seven continuous years, nothing being heard of him during that time, raises a presumption he is dead... 9
- when instruction as to "satisfactory evidence of death" to be produced to insurance company is misleading..... 10

INTEREST.

- amount of solicitor's fee, when fixed by court in foreclosure, may be included in decree and draw interest..... 99
- sections 42 and 86 of Local Improvement act, fixing rate of interest on deferred installments and bonds, are not unconstitutional in precluding a lower rate of interest.... 452
- special assessment cannot lawfully be made to draw interest unless payable in installments..... 592

JOINT WILLS.—See WILLS.

JUDGMENTS AND DECREES.

- it is not proper to enter two judgments of sale for the same lots, although the first was invalid because not signed by the judge..... 51
- order sustaining demurrer to bill is not a final order, from which an appeal will lie..... 59
- recital in appeal bond approved by clerk that complainant's bill was dismissed does not show that a decree was entered dismissing the bill..... 59
- when judgment against the plaintiff for costs in not a final, appealable judgment..... 70
- amount of solicitor's fee, when fixed by the court in foreclosure, may be included in decree and draw interest... 99
- when decree is erroneous in ordering administrator to turn over personal assets in his hands..... 160
- judgment by court having no jurisdiction of the subject matter is a nullity, and the court may, of its own motion, take notice of the want of jurisdiction..... 268
- cross-complainant may dismiss cross-bill without prejudice before a decree dismissing it for want of equity is entered..... 338

JUDGMENTS AND DECREES.—*Continued.*

PAGE.

judgment for special assessment must be certain in amount.	347
when omission of dollar-mark renders special assessment judgment uncertain.....	468, 347
a judgment of sale need not recite formal clause showing obtaining of jurisdiction by giving notice where parties appeared and objections were heard.....	468, 347
what omission does not invalidate judgment of sale.....	347
a confirmation judgment can be collaterally attacked, on an application for sale, only for want of jurisdiction apparent from the face of the record.....	367
authority to confess judgment must be strictly pursued, and if there is no power to enter the debtor's appearance and confess judgment the judgment is a nullity.....	370
judgment by confession must be for a fixed sum.....	370
power to confess judgment for rent accruing under written lease cannot be extended to the implied contract resulting from tenant's holding over.....	371
what order of court amounts to a restraint on issuing execution so as to exclude the period of delay from the one-year's life of the lien of the judgment.....	397
a court of equity will not set aside a decree upon ground that it was obtained by false evidence.....	404
former adjudication cannot be availed of unless pleaded..	404
form of judgment of sale for taxes prescribed by section 191 of Revenue act must be substantially followed.....	410
defect in form of judgment does not require new trial....	410
judgment organizing drainage district, even though erroneous, cannot be set aside on <i>quo warranto</i> if the court had jurisdiction of the subject matter and of parties....	421
judgment probating will is without jurisdiction as to the heirs whose whereabouts are known but who are not named in the petition nor given notice of it.....	438
what does not bar petition to set aside probate of will....	438
what irregularity does not invalidate judgment of sale....	444
foreclosure proceeding is not strictly a proceeding <i>in rem</i> , since the decree is not binding upon persons not parties to the suit.....	498

JUDICIAL NOTICE.

courts will not take judicial notice, as being a matter of common knowledge, that the right of way of a railroad is fenced as the track is constructed.....	27
Supreme Court will take judicial notice of the names of the various county judges of the State.....	269

JUDICIAL SALES.

PAGE.

section 7 of Administration act, requiring additional bond when executor sells land, does not apply to a sale by executor, as trustee, under direction of the will.....	238
when trustee need not sell within one year from time will is probated.....	238
trustee under will is bound to know the effect upon selling price of land of a proposed contest of the will which is a matter of public notoriety.....	238
fact that trustee has advertised sale does not compel him to accept an inadequate bid.....	238
when sale by trustee is a breach of trust.....	238

JURISDICTION.

when objection is waived by appearance.....	51
filing demurrer without limiting appearance gives jurisdiction of the person.....	104
when freehold is not involved.....	141
objections to special assessment not made in county court are waived if that court had jurisdiction to decide them.	268
an objection to jurisdiction of subject matter cannot be waived.....	268
judgment by court having no jurisdiction of subject matter is a nullity, and the court may take notice, of its own motion, of the want of such jurisdiction.....	268
when proceeding to cancel tax sale certificate and any deed issued thereon involves a freehold.....	325
right to writ of error must appear from the record.....	328
Supreme Court cannot hear extrinsic evidence to determine whether a person is so prejudiced by a judgment as to entitle him to resist dismissal of a writ of error.....	328
bill to contest will can be maintained only under the provision of section 7 of the Statute of Wills.....	332
statute in force at time bill to contest will is filed governs the question whether it has been filed within the time allowed by law.....	332
when grounds urged for reversal present no question of law for consideration of Supreme Court.....	358
when construction of constitution is involved.....	360
when court has jurisdiction to confirm special assessment though real owner of land received no notice.....	367
court of equity may enjoin collection of tax extended upon an assessment made by a body having no authority.....	609
mere assertion a constitutional question is involved is not sufficient to authorize Supreme Court to take jurisdiction	633
when constitutional question is not open to review.....	633

JURORS.

PAGE.

- jurors in the criminal court of Cook county may be transferred from one branch to another..... 72
- overruling challenge to array must be prejudicial to reverse..... 72
- previous to arraignment in a branch of the criminal court of Cook county the accused is entitled to a list of all the jurors in the criminal court..... 73
- correct practice where list of jurors in particular branch of criminal court is exhausted..... 73

LACHES.

- when a party is guilty of *laches* in applying to a court of equity to set aside decree..... 404
- defense of *laches* need not be set up in answer if *laches* is apparent from face of bill..... 404
- what constitutes *laches* in a particular case is largely a matter of discretion with chancellor..... 404
- laches* cannot be imputed to wife for failure to assert her inchoate right to dower during her husband's lifetime, since such right is a mere expectancy..... 498

LANDLORD AND TENANT.—See LEASES.

LAW AND FACT.

- if there is evidence tending to show plaintiff's signature to release was obtained by fraud, the court cannot hold, as a matter of law, that the release bars the action..... 341
- when grounds for reversal present no question of law.... 358
- when construction of constitution is involved..... 360
- whether holding over creates new tenancy is a question of fact..... 371

LEASES.

- additional service furnished to lessee by the lessor under a contract independent of lease does not pass, by implication, upon execution of new lease again silent on subject. 190
- exception to rule that holding over creates new tenancy... 370
- power to confess judgment for rent accruing under written lease cannot be extended to the implied contract resulting from the tenant's holding over..... 371
- whether holding over creates new tenancy is a question of fact..... 371
- provision that lessor will cause premises to be put in habitable condition for lessee by a certain date is an independent covenant rather than a condition precedent..... 523

LEASES.—Continued.	PAGE.
covenant going to part, only, of the consideration is generally considered as independent.....	523
in case of doubt whether provision of lease is a covenant or condition, courts will construe it as a covenant.....	523
when recovery of rent may be had on common counts....	523
an express covenant upon a subject excludes the idea of an inconsistent implied covenant.....	523
what does not excuse liability for rent.....	523
whether the acts of the landlord amount to an eviction is a question of fact.....	523
LEVY.—See EXECUTIONS.	
HUSBAND AND WIFE.	
when a wife may assert title to shares of stock as against creditors of husband although the stock stands on the books in the husband's name.....	351
LIENS.—See MORTGAGES; JUDGMENTS AND DECREES.	
LIMITATIONS.	
statute limiting time for filing claims against estate does not apply to an assessment on the stock of an insolvent national bank.....	178
what cannot be relied upon as color of title.....	228
section 279 of Revenue act, barring collection of special assessment not returned by certain time, does not apply where sections 61 to 67 of Improvement act are followed.	443
LOAN ASSOCIATIONS.	
appeal from final order in building and loan receivership is governed by section 67 of Practice act.....	53
LODGES.—See BENEFIT SOCIETIES.	
LUNATICS.—See CONSERVATORS.	
MARRIAGE.	
it is essential to the admission of church records in evidence that it be shown the entries were made by the person authorized to make them.....	154
it is not presumed, in aid of an alleged common law marriage, that a subsequent ceremonial marriage was a bigamous one.....	154
when alleged statements relied upon as tending to show a common law marriage are overcome.....	154

MASTER AND SERVANT.

PAGE.

- servant cannot recover for injury resulting from his selection of a dangerous way of doing work in preference to a safe way which was equally open to him..... 307
- master may assume that an experienced servant of mature years has ordinary mental faculties and usual powers of observation..... 307
- when doctrine of *res ipsa loquitur* does not apply..... 307
- what evidence tends to show negligence on part of hoisting engineer at a coal mine..... 341
- if there is evidence tending to show servant's signature to release was obtained by fraud, the court cannot hold, as a matter of law, that the release bars the action..... 341

MASTERS IN CHANCERY.

- master in chancery cannot arbitrarily fix his fee in a lump sum, without indicating the character or extent of his services..... 99

MISJOINDER.

- joining widow personally and in her capacity as administratrix as complainant in bill for specific performance is not a misjoinder of parties..... 104

MINES.

- mining rights are real property and taxable as such..... 283
- what evidence tends to show negligence upon the part of a hoisting engineer at a coal mine..... 341

MINORS.

- the claim that the incompetency of hearsay evidence was waived by counsel for the heirs in a partition suit cannot be urged against the infant defendants..... 488

MORTGAGES.

- tender, after suit begun to foreclose a trust deed providing for a solicitor's fee, must include the solicitor's fee and must be kept good..... 99
- amount of solicitor's fee may be included in the decree and draw interest..... 99
- master in chancery cannot arbitrarily fix his fee in a lump sum, without indicating the character and extent of his services..... 99
- purchaser of equity of redemption in encumbered property is not personally liable to pay the encumbrance unless he has expressly agreed to do so..... 389

MORTGAGES.—*Continued.*

PAGE.

- when extending time of payment does not make grantee in deed to encumbered property personally liable to pay the encumbrance..... 389
- foreclosure proceeding is not strictly a proceeding *in rem*, since the decree is not binding upon persons not parties.. 478
- mortgage does not create personal obligation if there is no promise to pay the debt, perform the contract or perform the act sought to be secured by the mortgage..... 549
- when mortgage of saloon fixtures does not create a covenant which the mortgagee may enforce by injunction... 549

MUNICIPAL CORPORATIONS.—See SPECIAL ASSESSMENTS.

- fact that amounts levied in tax levy ordinance for the various purposes are less than the amounts appropriated for same purposes is no objection to the tax..... 198
- a city is liable to a land owner for damage occasioned by wrongful delay in bringing a condemnation suit to trial and in electing to abandon proceeding after judgment.. 360
- the owner of the land at the time of the wrongful delay is the person entitled to recover damages..... 360
- when defendant in condemnation cannot recover expense of defending an abandoned suit as part of the damages occasioned by wrongful delay of petitioner..... 361
- when city is estopped to claim that party suing for damages for wrongful delay in bringing a condemnation suit to trial should have applied to court for speedy trial.... 361
- it is improper practice to permit counsel for a city to make up the trial calendar of the city's condemnation cases to suit his own convenience..... 361
- filing of certified copy of tax levy ordinance with county clerk is essential to validity of city tax..... 558

MURDER.

- when homicide in defense of habitation is justifiable.... 142
- one may, within his own house, use all needful force to keep an aggressor out, even to taking his life..... 143
- peril of life or great bodily harm not essential to justify a homicide in defense of habitation..... 143

NEGLIGENCE.

- plaintiff in personal injury case may recover all damages, present or prospective, which necessarily result from the injury..... 170
- when question of future damages is properly left to jury.. 171

NEGLIGENCE.—*Continued.*

PAGE.

future pain and suffering and inability to labor are part of the prospective damages recoverable.....	170
to justify assessment of prospective damages the evidence must show that plaintiff is reasonably certain to suffer such damages and the nature and extent thereof.....	170
in proving damages for impairment of ability to labor, the proper inquiry is the comparative capacity of plaintiff to earn money at time of and after the injury.....	220
when proof of prior capacity of plaintiff to earn money is too remote and uncertain to be competent.....	220
X-ray photographs are admissible in personal injury case after proper preliminary proof.....	220
when refusal of instruction that if the jury find plaintiff is not entitled to recover they need not consider the nature and extent of his injuries is not reversible error.....	252
effect upon the plaintiff's damages in personal injury case where physician used improper treatment or the injury developed an organic tendency to disease.....	274
servant cannot recover for injury resulting from his selection of a dangerous way of doing work in preference to a safe way equally open to him.....	307
master may assume that an experienced servant of mature years is possessed of ordinary mental faculties and usual powers of observation.....	307
when doctrine of <i>res ipsa loquitur</i> does not apply.....	307
use of electricity for profit requires care in its use commensurate with the danger thereof.....	318
when recovery for death of telephone lineman cannot be predicated upon negligence of electric light company respecting insulation of exposed wires.....	318
electric light company owes no duty to the public to give warning before turning on its current.....	318
what evidence tends to show negligence on the part of a hoisting engineer at a coal mine.....	341
release of damages obtained by fraud is void, and the consideration need not be returned nor the release canceled in equity before suing at law for damages.....	341
a railroad company undertaking to transport men to and from work must furnish them a reasonably safe place in which to ride.....	545
it is not negligence <i>per se</i> for a railroad workman to ride on top of box-car crowded with men and tools.....	545
when the presence of "tell-tales" or "whip-lashes" does not preclude recovery for the death of workman from being struck by low bridge.....	545

NEGOTIABLE INSTRUMENTS.—See BILLS AND NOTES.

NOTICE.	PAGE.
section 4 of Contracts act construed as not requiring notice to heirs of application by administratrix for an order to carry out deceased's contract of sale.....	104
persons dealing with partnership are required to take notice of the partnership, the identity of the partners, its business and the general course of the business.....	473

NUISANCE.

what is a sufficient averment, in declaration for nuisance, that noxious odors came upon plaintiff's premises.....	636
in case of a temporary nuisance, only damages sustained before the suit may be recovered.....	636

ORDINANCES.—See SPECIAL ASSESSMENTS.

when ordinance granting right to railroad company to lay tracks in street does not authorize a special assessment against company for paving.....	47
when ordinance for building sidewalk by special taxation is invalid.....	184

PARENT AND CHILD.

if child is the dominant party to a fiduciary relation between himself and parent, a deed from latter to child for inadequate consideration is presumed unfair.....	507
when a transfer of personal property from parent to child will be held free from undue influence.....	508

PARKS.

park commissioners may avail themselves of the provisions of the Local Improvement act of 1897.....	443
paragraph 5 of section 99 of the Improvement act applies to assessments confirmed under prior acts although not made payable in installments.....	443

PARTIES.

joining widow personally and in her capacity as administratrix as complainant in bill for specific performance is not a misjoinder of parties.....	104
when administrator cannot complain that he was not made a party as administrator.....	488
when receivers of an insolvent foreign corporation may sue out writ of error in name of corporation.....	561

PARTITION.

PAGE.

- if rights of minors are not involved equity cannot refuse partition where parties have brought themselves within the provisions of the statute..... 208
- decreeing partition before estate is settled is not error.... 208
- heirs are entitled to partition unreleased homestead estate after abandonment by widow and children..... 488
- value of homestead estate is a fixed quantity, which does not change with the value of the homestead premises... 488
- on partitioning an unreleased homestead estate, the value of the excess, if any, over the value of the homestead is determined as of the time partition is sought..... 488
- when allowance of solicitor's fees in partition is proper... 488

PARTNERSHIP.

- interest of partners in partnership property is neither joint nor in common, but is *sui generis*..... 473
- persons dealing with partnership are required to take notice of the firm, the identity of its members, its business and the general course of that business..... 473
- a person knowingly aiding a partner in defrauding the firm can claim no benefit from the transaction..... 473
- when transaction with partner is voidable..... 473
- effect where property disposed of by partner in fraud of partnership consists of negotiable paper..... 473
- a city warrant issued against a special assessment fund is not a negotiable instrument..... 473

PETITION.

- signers of petition for county seat election may withdraw their names at any time before county court has finally acted on the petition..... 302

PHOTOGRAPHS.

- X-ray photographs or skiographs are admissible in a personal injury case after proper preliminary proof..... 220
- jury may take photographs or skiographs, which have been given in evidence, to the jury room..... 220

PLEADING.

- joining widow personally and in her capacity as administratrix as complainant in bill for specific performance is not a misjoinder of parties..... 104
- bill by administratrix against heirs to compel them to carry out contract of sale need not allege the sale is necessary to pay debts of the estate..... 104

PLEADING.—*Continued.*

PAGE.

when defense of the Statute of Frauds cannot be raised by demurrer.....	104
filing a demurrer without limiting appearance gives jurisdiction of the person.....	104
if a plea of the Statute of Limitations does not present a defense to all of the counts it is not error to sustain a demurrer thereto.....	307
when recovery of rent may be had on common counts....	523
when omission of averment of use and occupancy of premises by defendant in suit for rent is cured by plea.....	523
what is a sufficient averment, in declaration for nuisance, that noxious odors came upon plaintiff's premises.....	636

PRACTICE.—See APPEALS AND ERRORS.

when objection is waived by appearance.....	51
in absence of a complete record in a chancery case no presumption of error obtains.....	53
it is the duty of appellant or plaintiff in error in a chancery case to bring up all the evidence that has been preserved in the record.....	53
under section 67 of the Practice act it is error to require an appeal bond to be filed within five days.....	53
appeal from final order in building and loan receivership is governed by section 67 of Practice act.....	53
order sustaining demurrer to bill is not a final order, from which an appeal will lie.....	59
recital in appeal bond approved by clerk that complainant's bill was dismissed does not show that a decree was entered dismissing the bill.....	59
jurors in criminal court of Cook county may be transferred from one branch to another.....	72
previous to arraignment in a branch of the criminal court of Cook county the accused is entitled to a list of all the jurors serving in the various branches.....	73
correct practice where list of jurors in particular branch of criminal court is exhausted.....	73
master in chancery cannot arbitrarily fix his fees in a lump sum, without showing character and extent of services...	99
it is not a matter of right, but of sound discretion with the trial court, whether a private attorney may assist State's attorney in criminal case.....	142
section 6a of the State's Attorneys act of 1903 does not deprive court of power to permit attorney paid by private parties to assist State's attorney.....	142
when refusal to allow amendment is error.....	239

PRACTICE.—*Continued.*

PAGE.

defense of adequate remedy at law must be raised below by demurrer or answer to the bill.....	178
upon demurrer to the evidence the evidence most favorable to complainant may be taken as true.....	239
filing separate briefs by different attorneys for the same party is in violation of rule 15 of Supreme Court.....	262
right to writ of error must appear from the record.....	328
plaintiff in error has the same right to dismiss a writ sued out in his name as to dismiss a suit begun by him in a court of original jurisdiction.....	328
the Supreme Court cannot hear extrinsic evidence to determine whether person is so prejudiced by a judgment as to entitle him to resist dismissal of writ of error.....	328
bill to contest will can be maintained only under the provisions of section 7 of the Statute of Wills.....	332
statute in force at time bill to contest will is filed governs question of whether it is filed within time allowed by law.	332
cross-complainant may dismiss cross-bill without prejudice before decree dismissing it for want of equity is entered.	338
it is improper practice to allow counsel for a city to make up a trial calendar of the city's condemnation cases to suit his own convenience.....	361
when city is estopped to claim that party suing for damages for a wrongful delay in bringing a condemnation suit to trial should have applied to court for speedy trial.....	361
authority to confess judgment must be strictly pursued....	370
power to confess judgment for rent accruing under written lease cannot be extended to the implied contract resulting from the tenant's holding over.....	371
if Appellate Court decides issues on merits and remands with directions to proceed in conformity with opinion, trial court can only enter final judgment without re-trial.	397
when judgment of Appellate Court is final.....	397
rehearing can only be asked on case as first made, and not upon an unabstracted additional record not called to the attention of the court on the hearing.....	424
when Supreme Court must affirm.....	596
fact that judge from whom a change of venue was taken afterwards reviews case as a judge of Appellate Court is not ground for reversal.....	625

PRESUMPTIONS.

unexplained absence of a person from his usual place of abode for seven continuous years, nothing being heard of him during that time, raises presumption that he is dead.	9
--	---

PRESUMPTIONS.— <i>Continued.</i>	PAGE.
in absence of a complete record in a chancery case no presumption of error obtains.	53
presumption of innocence of crime does not mean that one who has collected and kept his employer's money is innocent of any intent to defraud him.	114
it is not presumed, in aid of an alleged common law marriage, that a subsequent ceremonial marriage was a bigamous one.	154
courts will not presume that the marriage of one accused of bastardy was to avoid prosecution.	208
presumption is in favor of legality of assessment by board of review, and one seeking to overthrow it must affirmatively show sufficient grounds for doing so.	283
when deed from parent to child will be presumed unfair. .	507
PRINCIPAL AND AGENT.—See BROKERS.	
when principal is liable for agent's fraud.	134
PUBLIC IMPROVEMENTS.—See SPECIAL ASSESSMENTS.	
pumping station for sewage and a system of sewers covering but a portion of the city are a local improvement which may be made by special assessment.	268
QUO WARRANTO.	
judgment organizing drainage district cannot be set aside on <i>quo warranto</i> if the court had jurisdiction of the subject matter and of the parties.	421
RAILROADS.—See STREET RAILWAYS.	
defendant in condemnation is not required to prove ownership.	26
petitioner desiring to question cross-petitioner's allegation of title must take issue thereon.	26
question of ownership of land condemned must be determined before jury is empaneled to assess damages.	26
damages attendant upon leaving right of way unfenced for six months after completing railroad may be considered by the jury.	26
damages may be estimated to any motive power which the petitioner may elect to use under its charter.	26
when instruction as to danger from fire being an element of damage is not prejudicial.	26
if the instructions for both parties in condemnation assume that lands not taken are damaged, neither can complain of such assumption.	26

RAILROADS.—*Continued.*

PAGE.

- when ordinance granting right to railroad company to lay tracks in a street does not authorize a special assessment against the company for paving street..... 47
- a railroad company undertaking to transport men to and from work must furnish them a reasonably safe place in which to ride..... 545
- it is not negligence *per se* for a railroad workman to ride on top of box-car overcrowded with men and tools.... 545
- when the presence of "tell-tales" or "whip-lashes" does not preclude recovery for death of a workman from being struck by low bridge..... 545

RAPE.

- what must be shown to prove rape without force..... 73
- in prosecution for rape without force, the age of accused, being part of the *corpus delicti*, cannot be proved by the written confession of the accused..... 73
- in prosecution for rape without force the jury cannot fix the age of accused by inspection of his person..... 73

REAL PROPERTY.—See DEEDS; MORTGAGES; WILLS.

- when trust does not result to one who contributes part of the purchase money for land..... 119
- domicile of father at time of birth of child does not control its right to inherit in other States..... 208
- law legitimating child for purposes of inheritance is a rule of property..... 208
- section 3 of Statute of Descent, respecting legitimating of child, controls its right to inherit in this State regardless of its right in other States..... 208
- if rights of minors are not involved equity cannot refuse partition where parties have brought themselves within the provisions of the statute..... 208
- it is not error to decree partition before estate is settled.. 208
- the test of homestead right is whether the person through whom the right is claimed had, at his death, an interest in the land which could have been sold on execution.... 228
- wife acquires no homestead right in land held by husband as tenant at will..... 228
- mining rights are real property and taxable as such..... 283
- effect where mining rights are assessed, after severance, to purchaser, although the land, including minerals, was assessed for its full value to the owner..... 283
- homestead estate does not pass by deed not joined in by wife even though the deed is to the wife..... 488

REAL PROPERTY.— <i>Continued.</i>	PAGE.
heirs are entitled to partition unreleased homestead estate after abandonment by widow and children.....	488
value of homestead estate is a fixed quantity, which does not change in proportion to the increase or decrease in value of the homestead premises.....	488
on partitioning an unreleased homestead estate, the value of the excess, if any, over the homestead is determined as of the time partition is sought.....	488
<i>laches</i> cannot be imputed to wife for failure to assert her inchoate right of dower during husband's lifetime, since such right is a mere expectancy.....	498
foreclosure proceeding is not strictly a proceeding <i>in rem</i> , since the decree is not binding upon persons not parties to the suit.....	498
RECEIVERS.	
appeal from final order in building and loan receivership is governed by section 67 of Practice act, giving at least twenty days for filing appeal bond.....	53
when receivers of insolvent foreign corporation may sue out a writ of error in the name of the corporation.....	561
RECORDS.	
it is essential to the admission of church records in evidence that it be shown the entries were made by the person authorized to make them.....	154
REGISTRATION OF TITLE.	
admitting alleged abstracts of title in evidence without any proper preliminary proof is error.....	81
applicant for registration is not required to prove invalidity of tax deeds held by defendants.....	81
REHEARING.	
rehearing can only be asked on case as first made, and not upon an unabstracted additional record not called to the attention of the court on the hearing.....	424
RELEASE.	
release of damages obtained by fraud is void, and the consideration need not be returned nor the release canceled in equity before suing at law for damages.....	341
REMEDIES.—See ACTIONS AND DEFENSES.	

REPEAL.	PAGE.
when subsequent act repeals or creates an exception to a former act.....	598
RES JUDICATA.	
former adjudication cannot be availed of unless pleaded..	404
when the question of former adjudication cannot be determined.....	404
foreclosure proceeding is not strictly a proceeding <i>in rem</i> , since the decree is not binding upon persons not parties to the suit.....	498
a confirmation judgment is <i>prima facie</i> an adjudication of benefits.....	620
when constitutional question is not open to review.....	633
REVENUE.—See TAXES.	
REVIEW.	
court of equity will not set aside a decree upon the ground it was obtained by false evidence.....	404
RIGHTS AND REMEDIES.—See ACTIONS AND DEFENSES.	
ROADS AND BRIDGES.—See TAXES.	
SALES.—See JUDICIAL SALES.	
SELF-DEFENSE.—See MURDER.	
SIGNATURES.	
signers of petition for county seat election may withdraw their names at any time before county court has finally acted on the petition.....	302
SOLICITORS' FEES.	
tender, after suit begun to foreclose a trust deed providing for a solicitor's fee, must include the solicitor's fee and must be kept good.....	99
amount of solicitor's fee, when fixed by court in foreclosure, may be included in decree and draw interest from the date of the decree.....	99
when allowance of solicitor's fee in partition is proper...	488

SPECIAL ASSESSMENTS.

	PAGE.
when railroad company cannot be assessed for pavement..	47
when objection to jurisdiction is waived by appearance...	51
it is not proper to enter two judgments of sale for the same lots, although the first was invalid because not signed by the judge.....	51
first resolution for improvement need not state how the improvement is to be paid for.....	61
engineer's signature to estimate of cost need not be incorporated in record of first resolution.....	61
when estimate of cost is part of the first resolution.....	92
first resolution for paving an alley need not state the width of the alley nor how the improvement is to be paid for..	92
court not authorized to hold an ordinance unreasonable because witnesses may think improvement not necessary..	92
when description of broken stone for concrete is not uncertain.....	92
a supplemental assessment for deficiency cannot be levied before the improvement is completed.....	96
deficiency for which supplemental assessment may be levied cannot be determined until contract is performed.....	96
<i>prima facie</i> case of benefits, made by assessment roll in a drainage case, cannot prevail over clear proof that the assessment is grossly excessive.....	138
assessment roll in drainage case is <i>prima facie</i> evidence that the lands of the district are benefited to the extent of the amounts assessed against them.....	186
what are proper elements of damage which jury may consider when correcting drainage assessment roll.....	186
objections must be so made as to show on what points the decision of the court is asked.....	268
objections to confirmation of assessment which the county court has jurisdiction to hear and determine are waived if not presented in that court.....	268
objection that county court had no jurisdiction of the subject matter cannot be waived, and may be raised for the first time on appeal.....	268
when objections cannot be considered on appeal.....	268
pumping station for sewage and a system of sewers covering but a portion of city are a local improvement which may be made by special assessment.....	268
one county judge may hear the legal objections to special assessments and another try question of benefits.....	268
judgment by court having no jurisdiction of subject matter is a nullity, and the court may take notice, of its own motion, of the want of such jurisdiction.....	268

SPECIAL ASSESSMENTS.—*Continued.*

PAGE.

what does not prove failure to comply with statutory provision requiring steps for letting contract to be taken within fifteen days after final determination of case on appeal.	347
judgment for special assessment must be certain in amount.	347
when omission of dollar-mark renders special assessment judgment uncertain.....	468, 347
judgment of sale need not recite a formal clause showing obtaining of jurisdiction by giving notice, where parties appeared and objections were heard.....	468, 347
what omission does not invalidate judgment of sale.....	347
confirmation judgment can be collaterally attacked, on application for sale, only for want of jurisdiction apparent from the face of the record.....	367
when court has jurisdiction to confirm assessment though real owner of land received no notice.....	367
applications for judgment of sale for different installments of assessment are independent proceedings.....	410
certificate of publication construed.....	410
form of judgment of sale prescribed by section 191 of Revenue act must be substantially followed.....	410
judgment of sale must show amount due.....	410
defect in form of judgment does not require new trial....	410
when improvement constructed is substantially different from one authorized by the ordinance.....	424
if pavement cannot be constructed as authorized by the ordinance without impairing usefulness of the street, city should repeal the ordinance.....	424
property owners cannot be compelled to pay for improvement not authorized by the ordinance, upon the ground it is more beneficial than the one authorized.....	424
park commissioners may avail themselves of the provisions of the Local Improvement act of 1897.....	443
paragraph 5 of section 99 of the Improvement act applies to assessments confirmed under prior acts although not made payable in installments.....	443
provisions of sections 178 and 279 of Revenue act do not apply to a special assessment where the authorities have followed sections 61 to 67 of the Local Improvement act.	443
what irregularity does not invalidate judgment of sale....	444
engineer's estimate is sufficiently itemized if it is sufficient to give property owners a general idea of the cost of the substantial, component parts of the improvement.....	452
resolution at public hearing adhering to the first resolution need be only in general terms sufficient to identify the proposed improvement.....	452

SPECIAL ASSESSMENTS.—*Continued.*

PAGE.

sections 42 and 86 of Local Improvement act, fixing rate of interest on deferred installments and bonds, are not unconstitutional as precluding a lower rate of interest....	452
if evidence of benefits is heard in open court and is conflicting, the finding of the lower court will be upheld on appeal unless there is manifest error.....	453
when first step in letting contract will be presumed to have been in time.....	468
objection that second advertisement for bids was not made within ninety days after first bids were rejected is not good on application for judgment of sale.....	468
a city warrant issued against a special assessment fund is not a negotiable instrument.....	473
assessment cannot lawfully be made to draw interest unless payable in installments.....	592
when description of the water supply-pipes, fire hydrants, crosses and tees is insufficient.....	592
when street railway right of way is not liable to special assessment for laying water pipes.....	592
a supplemental assessment cannot be made before work is completed and the deficiency ascertained.....	620
improvement is not completed until accepted by the board of local improvements as complying with the contract..	620
a confirmation judgment is <i>prima facie</i> an adjudication of benefits.....	620

SPECIAL TAXATION.

when sidewalk ordinance is invalid.....	184
---	-----

SPECIFIC PERFORMANCE.

if administratrix is unable to carry out deceased's contract for sale of land because heirs will not join in conveyance she may file a bill for specific performance.....	104
section 4 of Contracts act, permitting personal representative, upon notice, to obtain an order for a conveyance of land, does not require notice to heirs.....	104
it is not essential to the validity of contract for sale of land made by an agent of the purchaser that the seller know the name of the purchaser.....	104
bill by administratrix against heirs to compel them to carry out contract of sale need not allege that the sale is necessary to pay debts of the estate.....	104
in determining the rights of the parties in specific performance the court cannot consider the wisdom of the law on which such rights are based.....	105

SPECIFIC PERFORMANCE. — <i>Continued.</i>	PAGE.
if contract to sell land shows the conveyance is to be made to two persons, conveyance of entire title to one of them alone cannot be specifically enforced.....	249
STATE'S ATTORNEYS. —See CRIMINAL LAW.	
STATUTE OF FRAUDS.	
when defense of Statute of Frauds cannot be raised by demurrer.....	104
STATUTE OF LIMITATIONS. —See LIMITATIONS.	
STATUTES. —See CONSTITUTIONAL LAW; CONSTRUCTION.	
when subsequent act repeals or creates an exception to a former act.....	598
STOCK AND STOCKHOLDERS. —See CORPORATIONS.	
STREET RAILWAYS.	
to justify assessment of prospective damages the evidence must show that the plaintiff is reasonably certain to suffer such damages and the nature and extent thereof.....	170
when question of future damages is properly left to jury..	171
effect upon the plaintiff's damages in a personal injury case where physician used improper treatment or the injury developed organic tendency to disease.....	274
when a street railway right of way is not liable to special assessment for laying water pipes.....	592
SUBSCRIBING WITNESSES. —See WILLS.	
TAX DEEDS.	
alleged error in canceling tax sale certificate after a deed had been issued thereon is harmless, where deed itself was properly canceled also.....	325
refusal of defendant in bill to cancel tax deed to accept a sufficient tender renders him liable for all the costs occasioned by such refusal.....	325
TAXES. —See SPECIAL ASSESSMENTS.	
certificate of levy of road and bridge tax need not specify amount required for each particular purpose.....	198, 174
if statute has not, in fact, been complied with in levying a town tax, tax cannot be validated by allowing amendments on application for sale.....	174
what is not a sufficient levy of county taxes.....	558, 197

TAXES.—*Continued.*

PAGE.

designation of town tax as for "town purposes" is not sufficient, under the statute.....	197
when statement attached to town clerk's certificate of levy of a town tax is a part thereof.....	197
right of electors at a town meeting to vote to levy a tax in anticipation of future demands.....	197
effect where there is deficiency for the payment of audited claims and demands against town.....	198
filing the original certificate of levy instead of the copy required by section 16 of the Road and Bridge act is fatal to the tax.....	198
fact that amounts levied in tax levy ordinance for the various purposes are less than the amounts appropriated for same purposes is no objection to the tax.....	198
failure of assessor to view land does not defeat tax.....	256
board of assessors in Cook county is not required to view the property it assesses.....	256
township assessor in Cook county is a deputy to the board of assessors, and his assessments are subject to review by such board.....	256
chief clerk of the board of assessors is the proper person to give information to property owners of Cook county as to the valuation put upon their property.....	256
reliance by a tax-payer in Cook county upon information from township assessor as to the valuation put upon his property does not vitiate tax though tax-payer is misled.	256
failure to publish list of assessments does not vitiate tax..	256
only question for decision on appeal from board of review is whether the property was subject to taxation, and not whether it was correctly valued.....	283
presumption is in favor of legality of assessment by board of review, and one seeking to overthrow it must affirmatively show sufficient grounds for doing it.....	283
mining rights are real estate and taxable as such.....	283
effect where mining rights are assessed, after severance, to the purchaser, although the land, including the minerals, is assessed to the owner.....	283
act of 1901, in so far as it requires valuation fixed by State board to be used in determining the maximum amount of tax to be raised, is not unconstitutional.....	458
acts of May 9, 1901, and May 10, 1901, do not prescribe a limitation upon taxation.....	458
when valuation of the State Board of Equalization must be used.....	458
failure to substantially comply with statute vitiates tax....	458

TAXES.—Continued.

PAGE.

in levying a county tax for several purposes county board must state sum needed for each purpose separately..	503, 458
resolution of county board fixing the rate per \$100 valuation to be levied for county taxes sufficiently determines the aggregate amount to be raised.....	503
additional road and bridge tax authorized by section 14 of Road and Bridge act is intended only for a contingency, and cannot be used for ordinary expenses.....	503
when district road tax is invalid.....	558
filing of a certified copy of tax levy ordinance with county clerk is essential to validity of city tax.....	558
equity may enjoin collection of tax extended upon an assessment made by a body having no authority.....	609
the Cook county board of assessors may assess property omitted by township assessor.....	609
board of review has no power to review the assessment of credits for previous years and increase the same under the guise of assessing omitted property.....	614
under-valuation of property is not, of itself, evidence of fraud.....	614
board of review has no power to take action after returning books to county clerk.....	614
when assessment of omitted property is void.....	614
when county tax is void.....	614

TENDER.

tender, after suit begun to foreclose a trust deed providing for solicitor's fee, must include solicitor's fee and must be kept good.....	99
refusal of defendant in bill to cancel tax deed to accept a sufficient tender renders him liable for all the costs occasioned by such refusal.....	325

TOWNS.—See MUNICIPAL CORPORATIONS; TAXES..**TOWNSHIP ORGANIZATION.**

right of electors at annual meeting to vote to levy a tax in anticipation of future demands.....	197
effect where there is a deficiency for payment of audited claims and demands against town.....	198

TRIAL.—See APPEALS AND ERRORS.

admitting improper evidence is harmless if the fact sought to be proved thereby is fully established by other competent evidence in the record.....	10
when question of future damages is properly left to jury..	171

TRIAL.—*Continued.*

PAGE.

jury may take photographs or skiographs, which have been given in evidence, to the jury room.....	220
X-ray photographs or skiographs are admissible in evidence after proper preliminary proof.....	220
repetitions of instructions need not be given.....	252
statements of prosecuting attorney derogatory to accused are not ground for reversal if they are based upon the facts established by the evidence.....	287

TRUSTS.

when trust does not result to one who paid part of the purchase money for land.....	119
estate of a trustee under a will is commensurate with his powers.....	125
when estate is liable for assessment on stock of an insolvent national bank.....	178
statute limiting time for filing claims against an estate does not apply to an assessment on the stock of an insolvent national bank.....	178
section 7 of Administration act, requiring additional bond when executor sells land, does not apply to a sale by the administrator in his capacity as trustee.....	238
when sale need not be made in one year.....	238
a trustee to sell land is bound to know the effect upon selling price of a proposed contest of the will which is commonly known.....	238
fact that trustee has advertised sale does not compel him to accept an inadequate bid.....	238
when sale by trustee is a breach of trust.....	238

UNDUE INFLUENCE.—See FRAUD.**USAGES.**

employing a broker to act in a particular market is taken as intending the business will be done according to the usages and customs of the market.....	562
when apparent variance between "bought" and "sold" notes is explained by usages and customs of market.....	562

VARIANCE.

an immaterial variance between "bought" and "sold" notes does not vitiate the contract.....	562
when apparent variance between "bought" and "sold" notes is explained by usages and customs of the market.....	562

VERDICT.

PAGE.

- Supreme Court may look into entire record to determine whether a verdict is sufficiently certain to support the judgment..... 67
- when a verdict for "the sum of (\$2600.00) twenty-six and no-100 dollars" is sufficiently certain..... 67

VESTED RIGHTS.

- party has no vested right to have statute regulating time for filing bill to contest will remain unchanged after the will is probated..... 333

VILLAGES.—See MUNICIPAL CORPORATIONS.**WAIVER.**

- when objection to jurisdiction is waived by appearance... 51
- objections to special assessment not made in county court are waived if the court had jurisdiction to decide them.. 268
- objection to jurisdiction of the subject matter cannot be waived..... 268
- when alleged error in refusing instructions is waived.... 341
- claim that incompetency of hearsay evidence was waived by counsel for the heirs in partition suit cannot be urged against the infant defendants..... 488

WARRANTS.

- a city warrant issued against a special assessment fund is not a negotiable instrument..... 473

WIDOW'S AWARD.

- creditors cannot compel a widow to claim her award for their benefit nor can they claim it for her..... 488

WILLS.

- testator's intent must prevail if clearly conceived and not contrary to law, although the gift is not made in formal language..... 124
- gift need not be in express words in order to have effect of disinheritng heirs..... 124
- in order to ascertain testator's intention the court may look to the state of the property devised..... 124
- the court, in construing a will, may supply words obviously omitted..... 124
- when court may substitute "and" for "or"..... 124
- estate of trustee is commensurate with his powers..... 125
- language of will construed as not passing the title to bank stock but merely the right to dividends thereon for life.. 178

WILLS.—*Continued.*

PAGE.

when sale by trustee under will need not be made within one year from probate.....	238
when executor is trustee.....	238
section 7 of Administration act, requiring additional bond when executor sells land, does not apply to a sale by the executor, as trustee, under direction of the will.....	238
admitting in evidence in a will contest the endorsement of the probate judge on the will, showing will to be proved and admitted to probate, is error.....	291
allegations of bill that will in contest was probated do not cure error in admitting order of probate.....	291
error in admitting order of probate in will contest is not cured by instruction to disregard it.....	291
burden of proof of undue influence where fiduciary relation existed between testator and devisee.....	291
when instructions for proponent in will contest are erroneous in isolating separate facts and stating that such facts are not sufficient to overthrow will.....	292
bill to contest will can be maintained only under the provisions of section 7 of the Statute of Wills.....	332
statute in force at time bill to contest will is filed governs the question whether it has been filed within the time allowed by law.....	332
act of 1903, reducing time for filing bill to contest will to one year from time of probate, applies to wills probated before the act took effect.....	333
party has no vested right to have statute regulating time for filing bill to contest will remain unchanged after the will is probated.....	333
rule as to attestation of wills.....	428
a "credible witness" to a will means one who is legally competent to testify in court to the facts which he attests by subscribing his name to the will.....	428
test of competency of subscribing witness.....	428
subscribing witness to will does not exercise judicial power with respect to his opinion of testator's mental capacity.....	428
subscribing witness to will is not necessarily disqualified by a relationship to testator which might disqualify him as a judge or juror in suit between heirs and devisees.....	428
section 2 of Statute of Wills, concerning subscribing witnesses and the effect of their testimony, is not unconstitutional, as delegating judicial power to them.....	428
Statute of Wills, in limiting evidence of mental capacity on probate and on appeal to circuit court to the testimony of subscribing witnesses, not unconstitutional.....	428

WILLS.—*Continued.*

	PAGE.
person not disqualified to witness will because his grandson is a legatee under the will.....	428
fact that person who drew will is named as executor does not invalidate will.....	428
judgment probating will is without jurisdiction as to heirs whose whereabouts are known but who are not named as heirs in the petition nor given notice thereof.....	438
what does not bar petition to set aside probate.....	438
word "bequeath" may denote a gift of real property.....	508
when particular real estate passes under residuary clause of will and not under a clause directing application of proceeds from the sale of land.....	508
right of persons to jointly execute a will.....	552
a joint will must not suspend disposition of the property until the death of both parties.....	552
when single instrument, executed as a joint will, may be given effect as the separate will of each signer.....	552
provision of will construed as not requiring widow to make equal distribution between children.....	625

WITNESSES.—See WILLS.

when instruction as to credibility of witness is erroneous..	83
when parties defendant may testify for co-defendant in a suit by heirs to set aside deed.....	229
when instruction as to disregarding false testimony is erroneous.....	292

WORDS AND PHRASES.

instruction requiring jury to acquit accused unless the evidence "generates a full belief of his guilt" is properly refused.....	114
when court, in construing will, may change "or" to "and"..	124
a "credible witness" to a will is one who is legally competent to testify in court to the facts which he attests by subscribing his name to the will.....	428
word "bequeath" may denote a gift of real property.....	508

X-RAY PHOTOGRAPHS.—See PHOTOGRAPHS.

TABLE OF CASES

COMPRISING THE FORMER DECISIONS CITED, COMMENTED UPON OR
EXPLAINED IN THIS VOLUME.

A

PAGE.

Aldis v. Union Elevated R. R. Co. 195 Ill. 456.....	635
Aldrich v. Metropolitan West Side El. R. R. Co. 195 Ill. 456..	635
Allwood v. Cowen, 111 Ill. 481.....	615, 611
Alsdurf v. Williams, 196 Ill. 244.....	356
Ames v. Ames, 148 Ill. 321.....	217
Anderson v. Smith, 159 Ill. 93.....	494, 493
Anderson v. Steger, 173 Ill. 112.....	332
Andrews v. Black, 43 Ill. 256.....	435
Anglo-American Mort. Co. v. Provident Inst. 124 Fed. Rep. 464.	578
Anglo-American Provision Co. v. Prentiss, 157 Ill. 506....	588, 587
Arms v. Ayer, 192 Ill. 601.....	605
Aulger v. Clay, 109 Ill. 487.....	101

B

Bailey v. Bensley, 87 Ill. 556.....	585
Baird v. Evans, 20 Ill. 29.....	533
Baltimore City Ry. Co. v. Kemp, 61 Md. 74.....	279
Baltimore and Ohio and C. R. R. Co. v. I. C. R. R. Co. 137 Ill. 9.	194
Barbour v. Mortgage Co. 102 Ill. 121.....	591
Barker v. Perry, 67 Iowa, 146.....	225
Barrett v. Boddie, 158 Ill. 479.....	541
Barrows v. Barrows, 138 Ill. 649.....	494
Bartel's Estate, <i>In re</i> , Myr. Pro. 130.....	442
Bartley v. People, 156 Ill. 234.....	116
Bassett v. Lockard, 60 Ill. 164.....	218
Beach v. Peabody, 188 Ill. 75.....	635
Betts v. Harper, 39 Ohio St. 639.....	555
Bickerdike v. City of Chicago, 203 Ill. 636.....	454, 93, 66
Blair v. Reading, 99 Ill. 600.....	340
Blake v. State Bank of Freeport, 178 Ill. 182.....	381
Blinn v. Gillett, 208 Ill. 473.....	128
Blythe v. Ayres, 96 Cal. 532.....	213, 212, 211
Bongard v. Core, 82 Ill. 19.....	356

	PAGE.
Boyd v. McConnell, 209 Ill. 396.....	434
Boyles v. Boyles, 37 Iowa, 592.....	442
Boyles v. McMurphy, 55 Ill. 236.....	130
Brock v. State, 85 Ind. 397.....	215
Burger v. Potter, 32 Ill. 66.....	109
Burt v. Quisenberry, 132 Ill. 385.....	516, 515
Burton v. Goodspeed, 69 Ill. 237.....	586
Burton v. Perry, 146 Ill. 71.....	407
Burton Stock Car Co. v. Traeger, 187 Ill. 9.....	613, 612, 259
Bush v. Hanson, 70 Ill. 480.....	384
Bush v. Sherman, 80 Ill. 160.....	470

C

Calumet and Chicago Dock Co. v. Morawetz, 195 Ill. 398.....	635
Canfield v. Wooster, 26 Conn. 384.....	443
Carson v. City of Hartford, 48 Conn. 68.....	363
Casey v. People, 165 Ill. 49.....	370
Caswell v. Caswell, 120 Ill. 377.....	407
Catholic Bishop of Chicago v. Bauer, 62 Ill. 188.....	537
Cawley, Estate of, 136 Pa. 628.....	555
Centralia and Chester R. R. Co. v. Brake, 125 Ill. 393.....	32
Centralia and Chester R. R. Co. v. Rixman, 121 Ill. 214.....	32
Centralia, City of, v. Wright, 156 Ill. 561.....	640
Chapin v. Drake, 57 Ill. 295.....	265
Chaplin v. Comrs. of Highways, 126 Ill. 264.....	634
Charlebois, Estate of, 6 Mont. 373.....	442
Chase v. Dana, 44 Ill. 262.....	381
Cheltenham Improvement Co. v. Whitehead, 128 Ill. 279.....	100
Chicago and Alton R. R. Co. v. People, 155 Ill. 276.....	505, 201
Chicago and Alton R. R. Co. v. People, 171 Ill. 544.....	177
Chicago and Alton R. R. Co. v. People, 190 Ill. 20.....	466
Chicago and Alton R. R. Co. v. People, 205 Ill. 625.....	505
Chicago-Anderson Pressed Brick Co. v. Sobkowiak, 148 Ill. 573.....	316
Chic., B. & Q. R. R. Co. v. People, 213 Ill. 458.....	619, 559, 522, 505, 497
Chicago, City of, v. Noonan, 210 Ill. 18.....	624, 623, 621, 97
Chicago, City of, v. Richardson, 213 Ill. 96.....	621
Chicago City Ry. Co. v. Barker, 209 Ill. 321.....	316
Chicago Legal News Co. v. Browne, 103 Ill. 317.....	543, 541
Chicago and Northwestern Ry. Co. v. Hoag, 90 Ill. 339.....	640
Chicago and Northwestern Ry. Co. v. People, 183 Ill. 247.....	177
Chicago and Northwestern Ry. Co. v. People, 184 Ill. 240.....	177
Chicago and Northwestern Ry. Co. v. People, 200 Ill. 141.....	177
Chicago Street Ry. Co. v. Osborne, 105 Ill. App. 462.....	255
Chicago Terminal R. R. Co. v. City of Chicago, 178 Ill. 429.....	270
Chicago Terminal R. R. Co. v. Schmelling, 197 Ill. 619.....	313
Chicago Title and Trust Co. v. Brown, 183 Ill. 42.....	334

Cicero, Town of, v. Green, 211 Ill. 241.....	595
Cincinnati, I. & W. Ry. Co. v. People, 207 Ill. 566..467, 201, 200, 176	
Cincinnati, I. & W. Ry. Co. v. People, 212 Ill. 518....205, 177, 176	
Cincinnati, I. & W. Ry. Co. v. People, 213 Ill. 197....620, 467, 227	
Claussenius v. Claussenius, 179 Ill. 545.....	436
Cleveland, Cin., Chic. & St. L. Ry. Co. v. People, 205 Ill. 582..	466
Cline v. Cline, 204 Ill. 130.....	124
Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151....387, 385, 383, 382	
Cobb's Estate, <i>In re</i> , 49 Cal. 599.....	442
Cody v. Town of Cicero, 203 Ill. 322.....	624
Coghill v. Kennedy, 119 Ala. 641.....	517, 299
Collins v. City of Council Bluffs, 32 Iowa, 324.....	278
Commissioners of Highways v. Barnes, 195 Ill. 43.....	304
Commissioners of Highways v. Quinn, 136 Ill. 604.....	304
Commissioners of Mason Drainage Dist. v. Griffin, 134 Ill. 330..	304
Commonwealth Electric Co. v. Melville, 210 Ill. 70.....	323
Comstock v. Hitt, 37 Ill. 542.....	395, 390
Condit v. Widmayer, 196 Ill. 623.....	611
Conklin v. Foster, 57 Ill. 104.....	236
Consolidated Coal Co. v. Baker, 135 Ill. 545.....	286
Consolidated Coal Co. v. Haenni, 146 Ill. 614.....	313
Consolidated Coal Co. v. Peers, 166 Ill. 361.....	396
Cox v. Hawkins, 199 Ill. 68.....	611
Craig v. Southard, 148 Ill. 37.....	297
Crain v. McGoon, 86 Ill. 431.....	101
Crawford v. Nimmons, 180 Ill. 143.....	396
Crommelin v. Theiss & Co. 31 Ala. 412.....	387
Culver v. People, 161 Ill. 89.....	445
Cummings v. West Chicago Park Comrs. 181 Ill. 136.....	445
Cutler v. Cutler, 188 Ill. 285.....	493

D

Dacey v. People, 116 Ill. 555.....	290
Daniher v. Daniher, 201 Ill. 489.....	235, 234
Davis, <i>In re</i> , 120 N. C. 9.....	555
Davis v. Wiley, 3 Scam. 234.....	533
Davison v. People, 90 Ill. 221.....	151
Dean v. Bailey, 50 Ill. 481.....	356
Deere v. Chapman, 25 Ill. 498.....	236
Despain v. Wagner, 163 Ill. 598.....	494
Devine v. Devine, 180 Ill. 447.....	124
Dickey v. People, 160 Ill. 633.....	369
Dobbins v. First Nat. Bank, 112 Ill. 553.....	336
Dolese v. Pierce, 124 Ill. 140.....	604, 603
Dowie v. Driscoll, 203 Ill. 480.....	517
Drainage Comrs. v. Illinois Central R. R. Co. 158 Ill. 353.....	300

	PAGE.
Drury v. Connell, 177 Ill. 43.....	632
Drury v. Holden, 121 Ill. 130.....	396
Duncan v. Wickliffe, 4 Scam. 452.....	109
Dunn v. People, 109 Ill. 635.....	152
DuPage County v. Jenks, 65 Ill. 275.....	259
Dusing v. Nelson, 7 Col. 184.....	71

E

East St. Louis, City of, v. Maxwell, 99 Ill. 439.....	607
East St. Louis Electric Ry. Co. v. Stout, 150 Ill. 9.....	271
Ebey v. Adams, 135 Ill. 80.....	132, 130
Engelthaler v. Engelthaler, 196 Ill. 230.....	128
Esmeralda v. District Court, 18 Nev. 438.....	304
Evans v. Howell, 211 Ill. 85.....	537
Evans v. Price, 118 Ill. 593.....	521
Evans v. Smith, 28 Ga. 98.....	555
Ewart v. Village of Western Springs, 180 Ill. 318.....	273

F

Fay, <i>Ex parte</i> , 15 Pick. 243.....	304
Feiten v. City of Milwaukee, 47 Wis. 494.....	363
Figge v. Rowlen, 185 Ill. 234.....	86
Finley v. Steele, 23 Ill. 54.....	539
First Nat. Bank v. Gates, 66 Kan. 505.....	486
Fisher v. Fairbank, 188 Ill. 187.....	133
Fiske v. People, 188 Ill. 206.....	270
Foley v. People, Breese, 57.....	271
Ford v. Whitridge, 9 Abb. Pr. 416.....	403
Foster v. City of Alton, 173 Ill. 587.....	369
Foster v. McKeown, 192 Ill. 339.....	537
Fowler v. Deakman, 84 Ill. 130.....	537
Fowler v. Fay, 62 Ill. 375.....	396
Fowler v. Fowler, 204 Ill. 82.....	110
Francis v. Wilkinson, 147 Ill. 370.....	516
Franklin Bank v. Cooper, 36 Me. 179.....	578
Frear v. Commercial Nat. Bank, 73 Ill. 473.....	381
Freeman v. Hartman, 45 Ill. 57.....	500
Frye v. Jones, 78 Ill. 627.....	381
Fuller v. Brown, 167 Ill. 293.....	101, 100
Furlong v. Riley, 103 Ill. 628.....	496

G

Gage v. Bailey, 119 Ill. 539.....	340
Gage v. Bailey, 102 Ill. 11.....	201
Gage v. Busse, 94 Ill. 590.....	326
Gage v. City of Chicago, 207 Ill. 56.....	454
Gage v. DuPuy, 137 Ill. 652.....	328

Gage v. People, 207 Ill. 61.....	413, 349
Gage v. People, 213 Ill. 347.....	472, 457
Gammon v. Gammon, 153 Ill. 41.....	245
Gardt v. Brown, 113 Ill. 475.....	588
Garvin v. Williams, 44 Mo. 465.....	299
Garvin v. Wiswell, 83 Ill. 215.....	485
Geisen v. Heiderich, 104 Ill. 537.....	606
Gilbert v. Reynolds, 51 Ill. 513.....	501
Givins v. People, 194 Ill. 150.....	470
Glennon v. Britton, 155 Ill. 232.....	304
Glos v. Cessna, 207 Ill. 69.....	82
Glos v. Hollowell, 190 Ill. 65.....	82
Glos v. Hoban, 212 Ill. 222.....	82
Glos v. Huey, 181 Ill. 149.....	24
Glos v. Kemp, 192 Ill. 72.....	24
Glos v. Perkins, 188 Ill. 467.....	24
Glos v. Randolph, 133 Ill. 197.....	24
Glos v. Randolph, 138 Ill. 268.....	25
Glover v. Condell, 163 Ill. 566.....	128
Glover v. People, 188 Ill. 576.....	369
Gogan v. Burdick, 182 Ill. 126.....	479
Goldsborough v. Gable, 140 Ill. 269.....	385
Goodkind v. Bartlett, 136 Ill. 18.....	500
Goodwillie v. Millmann, 56 Ill. 523.....	101
Gore v. People, 162 Ill. 259.....	79
Gorton v. City of Chicago, 201 Ill. 534.....	447
Graff v. City of Baltimore, 10 Md. 544.....	363
Grant Land Ass. v. People, 213 Ill. 256.....	613, 612
Gray v. Gray, 60 N. H. 28.....	443
Gray v. Schofield, 175 Ill. 36.....	493
Graybeal v. Gardner, 146 Ill. 337.....	298
Gregg v. Myatt, 78 Iowa, 703.....	442
Griffin v. Larned, 111 Ill. 432.....	68
Gross v. People, 172 Ill. 571.....	369
Gross v. People, 193 Ill. 260.....	451

H

Hadden v. Shoutz, 15 Ill. 581.....	538
Hall v. Hamilton, 74 Ill. 437.....	381
Hamilton v. Downer, 152 Ill. 651.....	111
Hamilton v. Lubukee, 51 Ill. 415.....	470
Hammer v. Johnson, 44 Ill. 192.....	395
Harland v. Eastman, 119 Ill. 22.....	24
Hauger v. Gage, 168 Ill. 365.....	332
Haven v. Wakefield, 39 Ill. 509.....	534, 533
Healey v. People, 177 Ill. 306.....	77
Hector v. Boston Electric Light Co. 161 Mass. 558.....	323

	PAGE.
Hewes v. Glos, 170 Ill. 436.....	273, 24, 23
Hier v. Kaufman, 134 Ill. 215.....	402
Hill v. Reno, 112 Ill. 154.....	217
Hirschman v. People, 101 Ill. 568.....	289
Hitz v. Ahlgren, 170 Ill. 60.....	17, 15
Holton v. Daly, 106 Ill. 131.....	607
Hooper v. Hooper, 9 Cush. 129.....	521
Hotchkiss v. Brooks, 93 Ill. 386.....	493
Hughes v. City of Moline, 163 Ill. 535.....	273
Hughes v. Washington, 65 Ill. 245.....	340
Huling v. Ehrich, 183 Ill. 315.....	612, 611
Hulshizer v. Lamoreaux, 58 Ill. 72.....	109
Humphreys v. Nelson, 115 Ill. 45.....	260
Hunt v. Morton, 18 Ill. 75.....	385
Hurd v. Goodrich, 59 Ill. 450.....	420, 419

I

Illinois Central R. R. Co. v. Simmons, 38 Ill. 242.....	638
Illinois Central R. R. Co. v. Sporleder, 199 Ill. 184.....	316
Illinois Central R. R. Co. v. Trustees of Schools, 212 Ill. 406...	635
Illinois Central R. R. Co. v. Turner, 194 Ill. 575.....	635
Illinois Iron and Metal Co. v. Weber, 196 Ill. 526.....	173
Illinois Steel Co. v. Schymanowski, 162 Ill. 447.....	316, 315
Illinois Steel Co. v. Wierzbicky, 206 Ill. 201.....	316
Indiana, Decatur and West. Ry. Co. v. Fowler, 201 Ill. 152....	346
Indiana, Decatur and West. Ry. Co. v. People, 201 Ill. 351...206,	200
International Bank v. Jenkins, 107 Ill. 291.....	574
International Packing Co. v. Cichowicz, 107 Ill. App. 234.....	399

J

Jele v. Lemberger, 163 Ill. 338.....	336, 334
Jewell v. Rock River Paper Co. 101 Ill. 57.....	419
Johnson v. Johnson, 114 Ill. 611.....	16, 15
Johnson v. People, 189 Ill. 83.....	369

K

Kauffman v. Peacock, 115 Ill. 212.....	500
Keating v. Springer, 146 Ill. 481.....	543, 541
Keegan v. Geraghty, 101 Ill. 26.....	215
Keegan v. Kinnare, 123 Ill. 280.....	537, 385, 382
Keister v. Keister, 178 Ill. 103.....	334
Keith v. Miller, 174 Ill. 64.....	588
Keller v. Hicks, 22 Cal. 457.....	486
Kelly v. City of Chicago, 148 Ill. 90.....	270
Kennedy v. Doyle, 10 Allen, 161.....	156
Keokuk and Hamilton Bridge Co. v. People, 145 Ill. 596.....	617

	PAGE.
Kilgallen v. City of Chicago, 206 Ill. 557.....	454, 93
Kimball v. Merchants' Savings, L. and T. Co. 89 Ill. 611..	612, 611
Kirkland v. Cox, 94 Ill. 400.....	133
Kitterlin v. Milwaukee Mechanics' Ins. Co. 134 Ill. 647.....	494
Krickow v. Pennsylvania Tar Manf. Co. 87 Ill. App. 653.....	381
Kusch v. Kusch, 143 Ill. 353.....	500

L

Lake Street Elevated R. R. Co. v. Burgess, 200 Ill. 628.....	638
Lanphere v. City of Chicago, 212 Ill. 440.....	594, 454
Lash v. Lash, 209 Ill. 595.....	133, 129, 128
Lawrence v. Lawrence, 181 Ill. 248.....	133
Lawrence's Will, <i>In re</i> , 7 N. J. Eq. 215.....	442
LeGendre v. Goodridge, 46 N. J. Eq. 419.....	515
Lieberman v. Chicago and S. Side Transit Co. 141 Ill. 140..	35, 31
Life Association of America v. Fassett, 102 Ill. 315.....	578, 576
Lins v. Lendhardt, 127 Mo. 271.....	515
Littell v. Board of Supervisors, 198 Ill. 205.....	306
Little v. Dyer, 138 Ill. 272.....	381
Lloyd v. Kirkwood, 112 Ill. 329.....	409
Lock v. Loxington, 122 Mass. 290.....	304
Lohmeyer v. Durbin, 206 Ill. 574.....	498
Loneragan v. Stewart, 55 Ill. 44.....	585
Louisville and Nashville R. R. Co. v. Koelle, 104 Ill. 455.....	538
Lovell v. Drainage District, 159 Ill. 188.....	140
Lunn v. Gage, 37 Ill. 19.....	534, 533
Luther v. Luther, 122 Ill. 558.....	336, 334
Lynch v. Baldwin, 69 Ill. 210.....	543
Lyon's Will, <i>In re</i> , 26 N. Y. Supp. 469.....	442

M

MacDougall v. Hoes, 58 N. Y. Supp. 209.....	403
Magee, Estate of, 63 Cal. 414.....	213
Maher, <i>In re</i> Estate of, 210 Ill. 160.....	401
Major, <i>In re</i> , 134 Ill. 19.....	286
Mali v. Spencer, 186 Ill. 363.....	46
Malott v. Hood, 201 Ill. 202.....	632
Martin v. Bolton, 75 Ind. 275.....	515
Martin v. Martin, 170 Ill. 639.....	217
Marx v. McGlynn, 88 N. Y. 357.....	299
May v. People, 92 Ill. 343.....	79
Mayer v. Pick, 192 Ill. 561.....	381
Mayor v. Ray, 19 Wall. 468.....	484
McCaleb v. Coon Run Drainage District, 190 Ill. 549.....	189
McChesney v. City of Chicago, 188 Ill. 423.....	624, 623
McChesney v. People, 174 Ill. 46.....	412

	PAGE.
McGeoch v. Hooker, 11 Ill. App. 649.....	591
McIntyre v. Sholty, 139 Ill. 171.....	331
McKinney v. Peck, 28 Ill. 174.....	385
Meul v. People, 198 Ill. 258.....	605
Michigan State Bank v. Gardner, 81 Mass. 362.....	578
Miller v. Pence, 132 Ill. 149.....	500
Miner v. Vedder, 66 Mich. 101.....	484
Mix v. People, 72 Ill. 241.....	201
Moffett v. Hanner, 154 Ill. 649.....	419
Moody v. Found, 208 Ill. 78.....	436
Moore v. People, 108 Ill. 484.....	58
Morrison v. People, 196 Ill. 454.....	605
Mount Hope Cemetery Ass. v. Weidenmann, 139 Ill. 67.....	536
Munro v. Munro, 1 Rob. (Scot. App. H. L.). 492. .214, 213, 212,	211
Murray v. Doud & Co. 167 Ill. 368.....	589
Myers v. City of Chicago, 196 Ill. 591.....	95

N

Nelson v. Oren, 41 Ill. 18.....	534
Nicholes v. People, 165 Ill. 502.....	52
Noble, In the matter of, 124 Ill. 266.....	433
Norris v. City of Baltimore, 44 Md. 598.....	363
North Chicago Street Ry. Co. v. Cotton, 140 Ill. 486.....	316

O

Odell's Estate, <i>In re</i> , 23 N. Y. Supp. 144.....	443, 442
Oliphant v. Liversidge, 142 Ill. 160.....	516
Osborn v. People, 103 Ill. 224.....	86
Ottawa, Town of, v. County of LaSalle, 12 Ill. 339.....	608

P

Palmer v. Meriden Britannia Co. 188 Ill. 508.....	536, 534
Papke v. Hammond Co. 192 Ill. 631.....	346
Patterson v. Graham, 140 Ill. 531.....	543
Payne v. Potter, 9 Iowa, 552.....	586
Pennell v. Lanier Ins. Co. 73 Ill. 303.....	419
Pennsylvania Co. v. Ellett, 132 Ill. 654.....	638
Pennsylvania Co. v. Lynch, 90 Ill. 333.....	316
People v. Atchison, Topeka and Santa Fe Ry. Co. 201 Ill. 365..	466
People v. Binns, 192 Ill. 68.....	336
People v. Blue Mountain Joe, 129 Ill. 370.....	605
People v. Chicago and Alton R. R. Co. 193 Ill. 364.....	467
People v. Chicago and Alton R. R. Co. 194 Ill. 51.....	467, 200
People v. Chicago and Northwestern Ry. Co. 183 Ill. 311.....	206
People v. City of Chicago, 152 Ill. 546.....	451
People v. Comrs. of Drainage District, 193 Ill. 428.....	423, 422

	PAGE.
People v. Compton, 132 Cal. 484.....	77
People v. Glenn, 207 Ill. 50.....	467, 466
People v. Indiana, Ill. and Iowa R. R. Co. 206 Ill. 612. .227, 177,	176
People v. Johnson, 100 Ill. 537.....	485
People v. Latham, 203 Ill. 9.....	185
People v. Peoria, Decatur and Evansville R. R. Co. 116 Ill. 410.	201
People v. Pierce, 90 Ill. 85.....	451
People v. Sellars, 179 Ill. 170.....	618, 615
People v. Smith, 149 Ill. 549.....	177
People v. Wilkinson, 13 Ill. 660.....	304
People's Bank v. Gridley, 91 Ill. 457.....	355, 354
Peoria, City of, v. Ohl, 209 Ill. 52.....	454
Peoria, Decatur and Evansville Ry. Co. v. Goar, 118 Ill. 134... 611	
Peoria, Pekin and Jacksonville R. R. Co. v. Laurie, 63 Ill. 264..	31
Pickler v. Pickler, 180 Ill. 168.....	124
Pierce v. Gardner, 10 Hare, 287.....	246
Pierson v. Armstrong, 1 Iowa, 282.....	521
Pike v. City of Chicago, 155 Ill. 656.....	273
Piper v. Connelly, 108 Ill. 646.....	538
Pittsburg, Ft. Wayne and Chicago Ry. Co. v. Chicago, 53 Ill. 80.	349
Police Jury v. Britton, 15 Wall. 566.....	484
Pond v. Pond, 8 Mich. 150.....	151
Pope v. Hanke, 155 Ill. 617.....	579, 267
Porter v. Rockford, Rock Island and St. L. R. R. Co. 76 Ill. 561.	260
Potter v. Potter, 41 Ill. 80.....	437
Potwin v. Johnson, 108 Ill. 70.....	451
Powell v. McDowell, 194 Ill. 394.....	132, 128
Prentice v. Achorn, 2 Paige, 30.....	515
Prickett v. Ritter, 16 Ill. 96.....	385
Primmer v. Clabaugh, 78 Ill. 94.....	356
Prince v. Cutler, 69 Ill. 267.....	419
Protection Life Ins. Co. v. Palmer, 81 Ill. 88.....	108
Prout v. Lomer, 79 Ill. 331.....	60
Pullman Palace Car Co. v. Bluhm, 109 Ill. 20.....	277
Purdy v. Henslee, 97 Ill. 389.....	340

R

Ramsey v. Peoria Marine and Fire Ins. Co. 55 Ill. 311.....	576
Rapp v. Stoner, 104 Ill. 618.....	396, 394, 390
Ray v. Segrist, 19 Ala. 810.....	442
Reed v. Reed, 135 Ill. 482.....	124
Reedy v. Millizen, 155 Ill. 636.....	16, 15
Reilly v. Reilly, 139 Ill. 180.....	340
Reins v. People, 30 Ill. 256.....	150
Rice v. Gilbert, 173 Ill. 348.....	355
Richie v. Cox, 188 Ill. 276.....	142

	PAGE.
Richmond's Appeal, 59 Conn. 226.....	517, 299
Rider v. People, 110 Ill. 11.....	289
Ripley v. Morris, 2 Gilm. 381.....	574
Robinson v. Supervisors, 16 Cal. 208.....	305, 304
Roby v. Colehour, 135 Ill. 300.....	167
Rodbourn v. U. I. & E. R. R. Co. 28 Hun, 369.....	403
Romberg v. McCormick, 194 Ill. 205.....	58
Roundy v. Hunt, 24 Ill. 598.....	381
Rowell v. Covenant Mutual Life Ass. 176 Ill. 557.....	634
Ruchinsky v. French, 168 Mass. 68.....	315
Russellville, Village of, v. Purdy, 206 Ill. 142.....	561, 206

S

Saladin v. Mitchell, 45 Ill. 79.....	589, 584, 583
Sanitary District v. Cullerton, 147 Ill. 385.....	153
Schlitz Brewing Co. v. Compton, 142 Ill. 511.....	641, 640
Schnadt v. Davis, 185 Ill. 476.....	103, 102
Scott v. Burton, 6 Tex. 322.....	71
Seaverns v. Lischinski, 181 Ill. 358.....	80
Sellars v. Barrett, 185 Ill. 466.....	616, 615
Shaw v. Moderwell, 104 Ill. 64.....	437
Sholl Bros. v. People, 194 Ill. 24.....	286
Siebert v. People, 143 Ill. 571.....	77
Siegel v. Borland, 191 Ill. 107.....	395, 391
Simpson v. Kansas City, 111 Mo. 237.....	363
Singer & Talcott Stone Co. v. Hutchinson, 176 Ill. 48.....	578, 574
Sinnet v. Bowman, 151 Ill. 146.....	334
Skahen v. Irving, 206 Ill. 597.....	122
Skakel v. People, 188 Ill. 291.....	635, 634
Smith v. Kinney, 33 Tex. 283.....	246
Smith v. Pringle, 100 Pa. St. 275.....	383
Sowell v. Sowell's Admr. 40 Ala. 243.....	442
Spaulding v. White, 173 Ill. 127.....	336, 335
Spring Valley Coal Co. v. People, 157 Ill. 543.....	617, 177
Springer v. Kroeschell, 161 Ill. 358.....	419
State Board of Equalization v. People, 191 Ill. 528.....	617
State v. Bank of Washington, 18 Ark. 554.....	578
State v. Cook, 61 N. W. Rep. (Neb.) 693.....	484
State v. Griffin, 87 Mo. 608.....	290
State v. Mansfield, 34 Minn. 250.....	304
Steenberg v. People, 164 Ill. 478.....	369
Stephenson v. McClintock, 141 Ill. 604.....	124
Stephenson v. State, 28 Ind. 272.....	80
Stetson v. City Bank of New Orleans, 2 Ohio St. 167.....	578
Stewart v. Apel, 5 Houst. (Del.) 189.....	382
Stewart v. City of Ripon, 38 Wis. 584.....	279
St. Louis, Jerseyville and S. R. R. Co. v. Kirby, 104 Ill. 345....	32

	PAGE.
St. Louis and San. Mining Co. v. Coal Mining Co. 111 Ill. 32..	577
St. Louis and Southeastern Ry. Co. v. Teters, 68 Ill. 144.....	31
St. Louis Transfer Co. v. Canty, 103 Ill. 423.....	635, 634
Stoltz v. Doering, 112 Ill. 234.....	215
Stone v. Mayor, 25 Wend. 157.....	304
Storey v. Storey, 125 Ill. 608.....	195
Storrs v. St. Luke's Hospital, 180 Ill. 368.....	336, 335
Strayer v. Dickerson, 205 Ill. 257.....	415
Stubbings v. City of Evanston, 156 Ill. 338.....	273
Sturms, <i>In re</i> , 25 Ill. 338.....	331
Sutton v. Read, 176 Ill. 69.....	219, 218
Swan v. People, 98 Ill. 610.....	290

T

Taft v. Schwamb, 80 Ill. 289.....	480
Tate v. Tate, 89 Ill. 42.....	437
Theurer v. People, 211 Ill. 296.....	306
Thomas v. Burlington Ins. Co. 47 Mo. App. 172.....	21
Thomas v. Whitney, 186 Ill. 225.....	517, 299, 167
Thomas v. Wiggers, 41 Ill. 470.....	196, 195
Thompson v. Multnomah County, 2 Ore. 34.....	304
Timm v. Harrison, 109 Ill. 593.....	606
Titus v. Mabee, 25 Ill. 232.....	60
Tomlinson v. Matthews, 98 Ill. 178.....	356
Topliff v. City of Chicago, 196 Ill. 215.....	456
Trainor v. Greenough, 145 Ill. 543.....	217
Trigger v. Drainage District No. 1, 193 Ill. 230.....	271, 188
Tucker v. Gill, 61 Ill. 236.....	381

U

Union Trust Co. v. Weber, 96 Ill. 346.....	617
United States v. Fox, 94 U. S. 315.....	215

V

Vahle v. Brackenseik, 145 Ill. 231.....	273
Vermilion County Children's Home v. Varner, 192 Ill. 594....	409
Vermont Street M. E. Church v. Brose, 104 Ill. 206.....	195
Virgin v. Virgin, 189 Ill. 144.....	500
VonTobel v. Ostrander, 158 Ill. 499.....	420

W

Wabash R. R. Co. v. Coon Run Drainage District, 194 Ill. 310..	84
Wachter v. Doerr, 210 Ill. 242.....	219, 217
Walker v. City of Chicago, 202 Ill. 531.....	95
Walker v. Shepard, 210 Ill. 100.....	167
Walker v. Smith, 29 Beav. 394.....	515

	PAGE.
Walker v. Walker, 2 Scam. 291.....	434
Wallace v. Curtiss, 36 Ill. 156.....	537
Ward v. Stout, 32 Ill. 399.....	72
Washburn v. City of Chicago, 202 Ill. 210.....	594
Way v. Way, 64 Ill. 406.....	271
Weaver v. Poyer, 70 Ill. 567.....	60
Wells v. People, 156 Ill. 616.....	273
West v. Americus Bank, 63 Ga. 230.....	68
West Chicago Park Comrs. v. Farber, 171 Ill. 146.....	445
West Chicago Street R. R. Co. v. Dwyer, 162 Ill. 482.....	316
West Chicago Street R. R. Co. v. Maday, 188 Ill. 308.....	222, 223
West Chicago Street R. R. Co. v. Petters, 196 Ill. 298.....	300
Weston v. Teufel, 213 Ill. 291.....	517
Whalen v. Stephens, 193 Ill. 121.....	419
Wheeler v. Wheeler, 134 Ill. 522.....	336, 334
White v. Gillman, 43 Ill. 502.....	535, 534
Whiting v. Nicoll, 46 Ill. 230.....	15
Whitmer v. Commissioners of Highways, 96 Ill. 289.....	304
Whitney v. Bohlen, 157 Ill. 571.....	381
Wilhelm v. People, 72 Ill. 468.....	77
Williams v. Chicago Exhibition Co. 188 Ill. 19.....	60
Williams v. Judy, 3 Gilm. 282.....	265
Williams v. People, 101 Ill. 382.....	79
Wilmerton, <i>In re</i> Appeal of, 206 Ill. 15.....	616
Wilson, <i>In re</i> , 32 Minn. 145.....	304
Wilson v. Roots, 119 Ill. 379.....	588
Wortman v. Price, 47 Ill. 22.....	46
Wright v. Lattin, 38 Ill. 293.....	535, 534
Wright v. Simpson, 200 Ill. 56.....	442

Y

Young v. Harkleroad, 166 Ill. 318.....	130
Young v. People, 171 Ill. 299.....	369

Z

Zimmerman v. Carpenter, 84 Fed. Rep. 750.....	182
Zimmerman v. Zimmerman, 15 Ill. 84.....	72

